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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1994**

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**DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER,**

***Petitioners,***

**v.**

**FIRST GIBRALTAR BANK, FSB, AND BENEFICIAL TEXAS, INC.,**

***Respondents.***

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# ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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**July 1994**

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33 pp

## QUESTION PRESENTED

**WHETHER TEXAS' CONSTITUTIONAL AND STATUTORY PROVISIONS PROTECTING HOMESTEADS FROM FORECLOSURE AND FORCED SALE ARE FEDERALLY PREEMPTED WHEN NEITHER FEDERAL STATUTES NOR REGULATIONS ADDRESS STATE HOMESTEAD PROVISIONS, AND WHEN ANY PREEMPTION IS DISCERNIBLE ONLY IN A DEPUTY GENERAL COUNSEL'S INTERPRETIVE LETTER, ISSUED WITHOUT OPPORTUNITY FOR NOTICE OR COMMENT.**

## TABLE OF CONTENTS

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WHETHER TEXAS' CONSTITUTIONAL AND STATUTORY PROVISIONS PROTECTING HOMESTEADS FROM FORECLOSURE AND FORCED SALE ARE FEDERALLY PREEMPTED WHEN NEITHER FEDERAL STATUTES NOR REGULATIONS ADDRESS STATE HOMESTEAD PROVISIONS, AND WHEN ANY PREEMPTION IS DISCERNIBLE ONLY IN A DEPUTY GENERAL COUNSEL'S INTERPRETIVE LETTER, ISSUED WITHOUT OPPORTUNITY FOR NOTICE OR COMMENT. . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 2

JURISDICTION . . . . . 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED . . . . . 2

STATEMENT OF THE CASE . . . . . 3

A. The Federal Statutory and Regulatory Background . . . . . 3

B. The Law Suit . . . . . 4

C. The District Court Decision . . . . . 5

D. The Court of Appeals Decision . . . . . 6

REASONS FOR GRANTING THE PETITION . . . . . 7

A. The Fifth Circuit's Erroneous Deference to An Admittedly Flawed Advisory Letter from an Agency Attorney Respecting Preemption of State Law Raises an Important Issue Respecting the Proper Federal-State Balance of Power . . . . . 8

B. This Court Should Resolve a Split Among the Circuits Respecting the Degree of Judicial Deference to Be Accorded to Informal Expressions of Agency Opinion, Particularly Respecting Preemption of State Law . . . . . 12

C. The Court of Appeals' Rationale for Finding Preemption of State Homestead Laws Based Upon Regulations Admittedly Vague as to Intent to Preempt Threatens to Alter the Balance of Federal/State Powers . . . . . 13

CONCLUSION . . . . . 22

**APPENDIX** ..... A-1

*First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir. 1994) ..... A-1

*First Gibraltar Bank, FSB v. Morales*, 815 F. Supp. 1008 (W.D. Tex. 1993) ..... A-48

Texas Constitution, Art. XVI, § 50 ..... A-68

Texas Property Code § 41.001. Interests in Land Exempt from Seizure ..... A-69

Texas Property Code § 41.002. Definition of Homestead A-69

12 U.S.C. § 1462(5) ..... A-70

12 U.S.C. § 1464 (excerpts) ..... A-71

12 U.S.C. § 3802(1) ..... A-72

12 U.S.C. § 3803 (excerpts) ..... A-72

12 U.S.C. § 3806(d) (excerpts) ..... A-73

12 C.F.R. § 545.2 ..... A-74

12 C.F.R. § 545.32(c) ..... A-74

12 C.F.R. § 545.33 (excerpts) ..... A-75

12 C.F.R. § 545.6-4a (excerpts) ..... A-76

Letter from Jack D. Smith, Deputy General Counsel, FHLBB, to John A. Maxim, Associate General Counsel, Dept. of Housing & Urban Dev. (Apr. 4, 1989), *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 82,502, at 61,707-08 (Aug. 4, 1989) . . . . . A-77

## TABLE OF AUTHORITIES

### Cases

*Aluminum Co. of Am. v. Central Lincoln People's Util. Dist.*, 467 U.S. 380 (1984) . . . . . 12

*Black & Decker Corp. v. Commissioner*, 986 F.2d 60 (4th Cir. 1993) . . . . . 19

*Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) . . . . . 9, 10, 13, 14-15

*City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992) (mem.) . . . . . 8

*City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588 (1994) . . . . . 9, 10

*Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991) . . . . . 12, 13

*CSX Transportation, Inc. v. Eastwood*, 113 S. Ct. 1732 (1993) 17

*Dewsnup v. Timm*, 112 S. Ct. 773 (1992) . . . . . 17-18

*FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) . . . . . 12

*Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) . . . . . 12

*Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) . . . . . 17, 20, 21

*First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir. 1994) . . . . . 2, 6, 7, 9-13, 15-16, 18, 19

*First Gibraltar Bank, FSB v. Morales*, 815 F. Supp. 1008 (W.D. Tex. 1993) . . . . . 2-6

*Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) . . . . . 10

*Gregory v. Ashcroft*, 501 U.S. 452 (1991) . . . . . 17

*Haig v. Agee*, 453 U.S. 280 (1981) . . . . . 11

*In Re Bubert*, 61 B.R. 362 (W.D. Tex. 1986), *aff'd*, 809 F.2d 259 (5th Cir. 1987) . . . . . 21

*Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) . . . . . 12

*Koray v. Sizer*, 21 F.3d 558 (3d Cir. 1994) . . . . . 13

*Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994), *granting cert. to review*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994), *rev'g* 786 F. Supp. 639 (S.D. Tex. 1991) . . . . . 9

*Marshall v. Rosemont, Inc.*, 584 F.2d 319 (9th Cir. 1978) . . 13

*NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) . . . . . 11

*North Dakota v. United States*, 495 U.S. 423 (1990) . . . . . 17

*Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) . . . . . 21

*TVA v. Hill*, 437 U.S.153 (1978) . . . . . 15

*Udall v. Tallman*, 380 U.S. 1 (1965) . . . . . 11

*United States v. Rutherford*, 442 U.S. 544 (1979) . . . . . 11

*United States v. Yazell*, 382 U.S. 321 (1966) . . 10, 14, 19, 21, 22

*Weber v. Heaney*, 793 F. Supp. 1438 (D. Minn. 1992), *aff'd on other grounds*, 995 F.2d 872 (8th Cir. 1993) . . . . . 11

*Zemel v. Rusk*, 381 U.S. 1 (1965) . . . . . 12

**Constitutions, Statutes and Regulations**

5 U.S.C. § 553 (1988), subsecs. (b) and (c) (1988) . . . . . 13

12 C.F.R. 545.2 (1984) . . . . . 16

12 C.F.R. ch. V . . . . . 4

12 C.F.R. § 545.2 (1994) . . . . . 3, 15

12 C.F.R. § 545.32(c) (1994) . . . . . 3, 4, 6

12 C.F.R. § 545.32(c)(2) (1994) . . . . . 6

12 C.F.R. § 545.32(c)(2) (1992) . . . . . 4

12 C.F.R. § 545.33(f) (1994) . . . . . 3, 4

12 C.F.R. § 545.6-4(a)(2) (1982) . . . . . 16

12 U.S.C. § 1462a(a and b) Supp. IV 1992) . . . . . 3

12 U.S.C. § 1464(a) (Supp. IV 1992) . . . . . 2, 4

12 U.S.C. § 1464(c)(1)(B) (Supp. IV 1992) . . . . . 2

12 U.S.C. § 3803(a)(3) (Supp. IV 1992) . . . . . 2, 4

28 U.S.C. § 1254(1)(1988) . . . . . 2

28 U.S.C. § 1331 (1988) . . . . . 4

Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801-06 (1988 & Supp. IV 1992) ("Parity Act") . . . . . 4, 5, 6, 18

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 101 Stat. 183 (1989) (codified at scattered sections of 12 U.S.C. and 15 U.S.C.) ("FIRREA") . . . . . 3

Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-70 (1988 & Supp. IV 1992)("HOLA") . . . . . 3, 4, 5, 6

Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, § 105(c)(8) (Nov. 10, 1988), codified at 26 U.S.C. § 163(h)(4)(C) (Supp. IV 1992) . . . . . 11, 15

TEX. CONST. Art. XVI § 15 . . . . . 22

TEX. CONST., Art. XVI, § 50 . . . . . 2, 5

TEX. FAM. CODE ANN. §§ 5.01-5.27 (Vernon 1993) . . . . . 22

TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1994) . . . 2, 5

TEX. PROP. CODE ANN. § 41.002 (Vernon Supp. 1994) . . . . 2

**Legislative Materials**

54 Fed. Reg. 49411 (1989) . . . . . 4

S. Rep. No. 445, 102nd Cong. 2d Sess. (1988), *reprinted*, 1988 U.S.C.C.A.N. 4515, 4516 . . . . . 11, 15

[Texas] House Research Organization, Special Legislative Report: Second Mortgages and the Texas Homestead Exemption (Dec. 21, 1988) . . . . . 15

**Other Authorities**

7 COLLIER ON BANKRUPTCY, *passim* (L. King ed. 15th ed. 1994) . . . . . 16

Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N. Car. L. Rev. 293 (1993) . . . . . 15, 21

Joseph W. McKnight, *Protection of the Family Home From Seizure by Creditors: the Sources and Evolution of a Legal Principle*, 86 S.W. Hist. Q. 369 (1983) . . . . . 16

Letter from Jack D. Smith, Deputy General Counsel, FHLBB, to John A. Maxim, Associate General Counsel, Dept. of Housing & Urban Dev. (Apr. 4, 1989), *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 82,502, at 61,707-08 (Aug. 4, 1989) . . . 6, 9-13, 15, 19

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Dan Morales, as Attorney General for the State of Texas, and Albert Endsley, as Texas Consumer Credit Commissioner (together, the "State"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 19 F.3d 1032 and at Appendix (page numbers designated "A") (separately bound and filed herewith) at A-1. The opinion of the United States District Court for the Western District of Texas is reported at 815 F. Supp. 1008 and reproduced at A-48.

## JURISDICTION

The court of appeals entered judgment on April 29, 1994. (A-1). There was no petition for rehearing. Upon the State's motion, the court of appeals stayed issuance of its mandate pending resolution of this petition for writ of certiorari. The State invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1)(1988).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article XVI, section 50 of the Texas Constitution (A-68), TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1994) (A-69), and CODE ANN. § 41.002 (Vernon Supp. 1994) (A-69), establish Texas' homestead exemptions.

The authority of the Federal Office of Thrift Supervision ("OTS") to regulate federal savings associations (such as respondent First Gibraltar Bank, FSB ("First Gibraltar") is established by 12 U.S.C. §1464(a) (Supp. IV 1992) (A-71). 12 U.S.C. § 1464(c)(1)(B) (Supp. IV 1992) (A-71), provides, in part, that "a Federal savings association may invest in, sell, or otherwise deal in . . . [l]oans on the security of liens upon residential real property." 12 U.S.C. § 3803(a)(3)(Supp. IV 1992)), (reproduced App. A-72) provides in part that "housing creditors" (such as respondent Beneficial Texas, Inc. ("Beneficial")) may make alternative mortgage transactions only to the extent that lawful OTS regulations permit federally

chartered savings associations to enter into such transactions; and 12 U.S.C. § 3803(c)(1988) (A-73) provides, "An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law or regulation."

12 C.F.R. § 545.2 (1994) (A-74) provides that OTS regulations preempt state law respecting "the operations of Federal savings associations . . .." 12 C.F.R. § 545.33(f) (1994), (A-75), gives "housing creditors" the authority to "make alternative mortgage transactions . . . notwithstanding any state constitution, law or regulation." 12 C.F.R. § 545.32(c) (1994) (A-74) defines the term "loan . . . made on the security of real estate" to require, among other things, that the security underlying such loan "may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located."

## STATEMENT OF THE CASE

### A. The Federal Statutory and Regulatory Background

No federal law or regulation expressly addresses whether the federal statutes and regulations governing federal savings associations extend to the preemption of state homestead laws. From 1933 until 1989, the Federal Home Loan Bank Board ("FHLBB"),[1] and since 1989, OTS, have promulgated regulations

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[1] *See* Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-70 (1988 & Supp. IV 1992)("HOLA"). HOLA, as enacted in 1933, provided for federal savings associations to be regulated by the Federal Home Loan Bank Board. Amendments to HOLA in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 101 Stat. 183 (1989) (codified at scattered sections of 12 U.S.C. and 15 U.S.C.) ("FIRREA") dissolved the FHLBB and shifted its regulatory responsibilities relevant to this case to a newly-created OTS, headed by a Director. *See* 12 U.S.C. § 1462a(a and b)(Supp. IV 1992); 54 Fed. Reg. 49411 (1989) (codified, 12 C.F.R. ch. V); 815 F. Supp. at 1013 (A-58). While some of the regulations at issue here were promulgated by the FHLBB and others by OTS, none of the relevant regulations has

"respecting the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations," 12 U.S.C. § 1464(a) (Supp. IV 1992), and codified these rules in part 545 of title 12 of the Code of Federal Regulations. 12 C.F.R. § 545.32 (1994) limits the types of loans that federal savings associations such as First Gibraltar can secure with residential and non-residential real estate. 12 C.F.R. § 545.32(c) (1994) defines the term "loan . . . made on the security of real estate," and further provides that the security interest underlying such loan is enforceable *"pursuant to the law of the state in which the property is located."* 12 C.F.R. § 545.32(c)(2) (1994) (A-74) (emphasis added). Under the Parity Act,[2] financial institutions such as Beneficial can issue and enforce AMTs notwithstanding contrary state laws to the extent that OTS permits federal savings associations to do so.

### B. The Law Suit

Invoking the trial court's jurisdiction under 28 U.S.C. § 1331 (1988), First Gibraltar and Beneficial sued the State in federal district court to obtain authority to make, purchase and enforce two types of AMT secured by liens on Texans' homesteads. 815 F. Supp. at 1009. They sought a declaration that the HOLA, the Parity Act, and regulations of the OTS

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materially changed. OTS adopted and recodified the FHLBB regulations relevant to this case. *See* 54 Fed. Reg. 49411 (1989).

[2] *See* Alternative Mortgage Transaction Parity Act, Pub. L. 97-320, 96 Stat. 1545, as amended, 12 U.S.C. §§ 3801-06 (1988 & Supp. IV 1992) ("Parity Act"). The Parity Act gives statutorily defined "housing creditors," such as Beneficial, the same authority to use alternative mortgage transactions ("AMTs") to secure repayment of credit that OTS regulations extend to federal savings associations, such as First Gibraltar. 12 U.S.C § 3803 (1988 & Supp. IV 1992) (A-72). An OTS regulation provides that housing creditors may make AMTs notwithstanding contrary provisions of state constitutions, laws or regulations. 12 C.F.R. § 545.33(f) (A-75).

preempted Texas' constitutional and statutory homestead protections to permit First Gibraltar and Beneficial to make, enforce and transfer those two types of AMTs. They contended that OTS had exercised its statutory authority to permit savings associations to make and enforce such AMTs, so that under the Parity Act, First Gibraltar and Beneficial had concomitant rights. First Gibraltar and Beneficial also sought a permanent injunction against the State's enforcement of Texas homestead provisions that would prevent First Gibraltar and Beneficial from perfecting, enforcing or transferring such AMTs other than as purchase-money security interests in Texans' residences.

### C. The District Court Decision

The district court granted summary judgment for the State, concluding that the federal laws and regulations did not reflect a clear intent to preempt Texas homestead exemption laws. The district court held that, as to the reverse annuity mortgages and line of credit conversion mortgages HOLA, the Parity Act, and regulations of the OTS did not preempt Texas' state constitutional and statutory prohibitions against the enforcement of non-purchase money mortgages upon Texans' homesteads.

The district court construed article XVI, § 50 of the Texas Constitution (A-68) and Texas Property Code section 41.001 (A-69) as voiding liens created by non-purchase money AMTs, such as those that First Gibraltar and Beneficial proposed, on Texas homestead property. 815 F. Supp. at 1010 (A-50). The court recognized OTS' authority to adopt preemptive regulations, and that OTS had by regulation preempted several aspects of state law relating to AMTs. Yet, the district court concluded that OTS regulations did not preempt Texas' homestead exemptions respecting the enforcement of alternative mortgage transactions because an OTS regulation "expressly provides that state law determines whether a loan on residential property is secured." 815 F. Supp. at 1014 (A-66) (footnote omitted), *citing* 12 C.F.R.

§ 545.32(c) (1994) (A-74) (security interest in real estate enforceable pursuant to state law). The district court therefore reasoned, "[s]ince the regulations specifically incorporate Texas law to determine whether a loan is secured in Texas, it is undeniable that the regulations promulgated pursuant to the [OTS] Director's authority under the HOLA were not intended to and do not preempt Texas homestead law." 815 F. Supp. at 1014 (A-62).

The district court reached this conclusion despite a letter by FHLBB's deputy general counsel in 1989 (A-77), opining that the regulations did preempt Texas homestead laws. Although the district court believed that the deputy general counsel's letter was "entitled to deference unless it is unreasonable," 815 F. Supp. at 1015 (A-63), the court declined to defer to the letter because it was "unreasonable given the unambiguous language of 12 C.F.R. § 545.32(c)[(2)] (1992) [security interest enforceable pursuant to state law]." *Id.* (bracketed material added).

### D. The Court of Appeals Decision

The Fifth Circuit reversed, concluding that pursuant to the HOLA and the Parity Act, OTS had the statutorily delegated authority to preempt state homestead exemption laws. 19 F.3d at 1040-44 (A-15-24). The court also decided that the OTS had effectively exercised its authority to preempt state homestead exemption laws. The court reached this conclusion by collecting the various FHLBB and OTS regulatory provisions that did bespeak preemption, although none of these provisions mentions state homestead exemptions. 19 F.3d at 1041-42 (A-15-18).

The court also concluded that under the Parity Act, if a federal savings bank such as First Gibraltar could enforce secured alternative mortgage transactions in contravention of Texas' homestead exemptions, so too could other housing lenders such as Beneficial. 19 F.3d at 1043-44 (A-22-23).

Finally, the court of appeals concluded that, even though FHLBB's superseded regulations and OTS' current regulations were vague respecting preemptive intent, read together the FHLBB and OTS regulations manifested an intent to preempt Texas' homestead laws as to the enforcement of the AMTs at issue from before 1982, and that nothing in subsequent regulatory provisions manifested a purpose to end that preemption. 19 F.3d at 1045 (A-25-26). The court reached this conclusion while acknowledging the "the current regulations governing federal savings associations are unfortunately *vague* on the topic of preemption," 19 F.3d at 1044 (A-24) (emphasis added), because "[a]ny ambiguity regarding agency intent arising from the text of the regulations themselves may be dispelled by reasonable agency constructions of the regulations." 19 F.3d at 1045 (A-25) (citation omitted).

## REASONS FOR GRANTING THE PETITION

This case presents questions purely of law, but these questions raise issues fundamental to the proper balance of federal and state powers and to the power of mid-level federal bureaucrats to dictate substantive law to federal courts.

These important questions are: Whether vague OTS regulations allowing federal savings associations and state-chartered loan companies to make AMTs, and preempting state constitutions and laws respecting the "operations" of these institutions, preempt state constitutional and statutory provisions governing when homes within that state can be subjected to foreclosure or involuntary sale; and whether a federal court must defer respecting the preemption question to a federal agency attorney's advisory letter, opining that these vague regulations accomplished preemption, even if the court believes the letter to be flawed in fundamental respects.

As detailed below, the fact that this Court has already granted certiorari respecting the degree of required judicial deference to informal agency interpretations in contexts other than preemption of state law demonstrates the fundamental importance of the deference issue. Here, that issue's importance is heightened when preemption of state law is the focus of the informal agency opinion, because the opinion thereby affects not just the proper functions of the federal government, but the proper balance of federal and state governmental powers as well. Indeed, as also detailed below, the court of appeals' opinion in this case creates a direct conflict respecting judicial deference to informal agency interpretations between the Fifth Circuit and the Tenth Circuit.

### A. The Fifth Circuit's Erroneous Deference to An Admittedly Flawed Advisory Letter from an Agency Attorney Respecting Preemption of State Law Raises an Important Issue Respecting the Proper Federal-State Balance of Power.

This Court has already recognized the fundamental need to resolve when a federal court must defer to an informal agency interpretation of the law it administers. In 1992, this Court granted certiorari and summarily remanded a case for reconsideration of statutory interpretation by the Court of Appeals for the Seventh Circuit in light of an informal memorandum by the Environmental Protection Agency Administrator expressing his view of the statute in question. *See City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486, 487 (1992)(mem.). When the Court again considered *City of Chicago*, it resolved the merits on other grounds, and therefore considered it unnecessary then to determine "whether an agency interpretation expressed in a memorandum like the [Environmental Protection Administration] Administrator's in this

case is entitled to any less deference under Chevron[3] than an interpretation adopted by rule published in the Federal Register, or by adjudication." *See City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 n.5 (1994) (footnote within quotation added). *See also Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994), *granting cert. to review*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994), *rev'g* 786 F. Supp. 639 (S.D. Tex. 1991) (extent to which statutory interpretations by the U.S. Comptroller of the Currency are entitled to judicial deference where statute being interpreted assertedly clear and Comptroller assertedly issued inconsistent interpretations).

The instant case once again squarely presents this important issue to the Court: When should a federal agency be permitted by informal expressions of its bureaucrats' views to bind the federal judiciary? Under the facts here presented, this question goes to the heart not only of the proper scope of federal agency policy making, but also, because the result is preemption of state real property law, to the heart of balance of powers between the states and the federal government under our federal system.

The court of appeals acknowledged that OTS' "current regulations governing federal savings associations are unfortunately *vague* on the topic of preemption" 19 F.3d at 1044 (A-24)(emphasis added) and that "specific references to these particular AMTs in the pertinent regulations are few," 19 F.3d at 1046 (A-30), but erroneously deferred to the 1989 FHLBB deputy general counsel's advisory letter, 19 F.3d at 1047 (A-31), to find that the FHLBB and OTS had a "clear and manifest purpose" to accomplish such preemption. 19 F.3d at 1044 (A-24) (inquiry is whether FHLBB/OTS had "clear and manifest

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[3] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) (Court accords "considerable weight" to formal "legislative regulations" of a federal agency construing statutory scheme the agency administers).

purpose" to preempt). The court below felt compelled by circuit precedent to defer to the letter, *see Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir.1988) (19 F.3d at 1047; A-31), even while admitting that the letter was "not without its flaws," 19 F.3d at 1048 (A-32); that it failed to address key issues of Texas law or a key FHLBB regulation, 19 F.3d at 1047-48 (A-32) ("Notably absent is any reference to state law or § 545.32(c)(2)"); and omitted discussion of congressional action inconsistent with preemption. 19 F.3d at 1048-49 (A-34-36). Moreover, the court of appeals conceded that the deputy general counsel took no position respecting preemption respecting AMTs by state-chartered lenders such as Financial here. 19 F.3d at 1044 (A-24). In addition, the letter also failed to address the strong Texas interest in its homestead protection scheme that this Court considered determinative in *United States v. Yazell*, 382 U.S. 321 (1966).

Even if this flawed informal letter could be considered an "agency's" interpretation of its regulations, rather than the expression of an individual lawyer's opinion,[4] the court of appeals should not have deferred to the letter under the standards established by the decisions of this Court respecting judicial deference to agency opinions.

The court of appeals should have distinguished, but did not, between the minimal deference due to an informal expression of an agency functionary's opinion, such as the letter, and the substantial deference properly due to formal agency regulations interpreting statutes that an agency administers. *Compare Chevron*, 467 U.S. at 843-45 (Court accords "considerable weight" to formal "legislative regulations" of a federal agency construing statutory scheme the agency administers) *with City of Chicago*, 114 S. Ct. at 1594 n.5 (noting open question whether informal agency

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[4] In *City of Chicago*, the informal expression of the EPA's statutory interpretation was at least articulated by the EPA's director. By contrast, here the advisory letter emanated from an agency deputy general counsel.

opinions entitled to same deference as regulations or formal adjudicatory decisions).

The court of appeals failed to apply this Court's standards as to when courts should defer to official agency statutory interpretions. *See* 19 F.3d at 1047 (A-30-31) (*citing, inter alia, Weber v. Heaney*, 793 F. Supp. 1438, 1455 (D. Minn. 1992) (collecting Supreme Court decisions), *aff'd on other grounds*, 995 F.2d 872 (8th Cir. 1993).[5]

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[5] The case-law factors weigh heavily against deference to the FHLBB deputy general counsel's letter in this case, even if the letter represented an official agency position. These factors are as follows: (1) Whether the agency has maintained its position consistently, even if infrequently. *See Haig v. Agee*, 453 U.S. 280, 293 (1981). Here, until this lawsuit, neither FHLBB nor OTS took any position as an agency, while Texas continued to enforce its homestead laws for some 10 years after FHLBB supposedly preempted them in part. Thus, FHLBB and OTS both consistently tolerated state practice which violated the position espoused in the letter; (2) Whether the agency interpretation is of long standing. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); the letter was issued in 1989, only three years before this case commenced in 1992; (3) Whether the public has relied on the interpretation. *See Udall v. Tallman*, 380 U.S. 1 (1965). Here, no financial institution has purported to extend, and no member of the public has obtained, credit in reliance on the letter. Indeed, the letter appears to have been unknown to the public. In a special provision of the federal Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, § 105(c)(8) (Nov. 10, 1988), codified at 26 U.S.C. § 163(h)(4)(C) (Supp. IV 1992), Congress permitted Texas taxpayers to deduct interest payments on consumer loans secured by invalid deeds of trust on consumers' residence, up to the amount of the equity in a respective consumer's home. The legislative history of this provision shows that Congress passed it precisely to avoid unfairly penalizing Texans respecting tax deductions simply because of the state's homestead exemption. *See* S. Rep. No. 445, 102nd Cong. 2d Sess. (1988), *reprinted*, 1988 U.S.C.C.A.N. 4515, 4516. The court of appeals appears to refer to this legislation when in its opinion it says, ". . . the persuasive force of the FHLBB Letter is not enhanced by the agency's failure to consider these acts of Congress suggesting the continued validity of Texas homestead law . . .." 19 F.3d at 1049 (A-36); (4) Whether the interpretation involves a matter of public controvesrsy. *See United States v. Rutherford*, 442 U.S. 544, 545 (1979). Since 1979, the banking community has tried unsuccessfully to abolish Texas' homestead laws. This is a subject of bitter political debate within Texas; (5) Whether the interpretation is based on an

## B. This Court Should Resolve a Split Among the Circuits Respecting the Degree of Judicial Deference to Be Accorded to Informal Expressions of Agency Opinion, Particularly Respecting Preemption of State Law.

The decision below, requiring judicial deference to an advisory letter from an agency deputy general counsel, respecting regulatory preemption of state law, creates a conflict between the

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agency's expertise in a complex area. *See Aluminum Co. of Am. v. Central Lincoln People's Util. Dist.*, 467 U.S. 380 (1984). Of course, the interpretation construed federal banking laws, a matter within FHLBB's expertise. But, as the court of appeals noted, the letter failed to consider Texas state law and history. Texas traditions, the state's interest in preserving its traditional homestead exemptions, and the proper balance between federal and state regulation are not subjects within FHLBB's special expertise. *See Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d at 1579. Moreover, also as noted by the court of appeals, the letter's treatment of FHLBB's own regulations was flawed; (6) Whether the agency has rulemaking authority. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978). Even if the FHLBB had rulemaking authority, the State's primary complaint is that the agency chose not to exercise that authority, and has instead purported to act only through an informal letter; (7) Whether Congress knew of and failed to repudiate the agency interpretation. *See Zemel v. Rusk*, 381 U.S. 1, 11 (1965). There is no evidence that Congress is aware of the advisory letter's interpretation. However, Congress has adopted legislation *inconsistent* with preemption of Texas homestead laws by the FHLBB and OTS: as noted above, in 1988 Congress amended the Internal Revenue Code to permit Texas taxpayers to deduct interest on second mortgage loans, even if the associated mortgage was unenforceable under Texas homestead law; (8) Whether the agency has expressly addressed the application of the statute to the proposed issue. *See Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971). Until this lawsuit only the letter existed - and the letter failed to discuss the Texas laws; (9) Whether the agency interpretation was contemporaneous with the passage of the statute, 19 F.3d at 1047. The HOLA was enacted in 1933. The letter is dated in 1989; (10) the thoroughness, validity, and consistency of the agency's reasoning. *See Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). According even to the court of appeals, the letter's reasoning is flawed and incomplete.

courts of appeals for the Fifth Circuit and the Tenth Circuit. In *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991), the Court of Appeals for the Tenth Circuit held that judicial deference to agency interpretations respecting preemption was inappropriate, reasoning that preemption is primarily an issue of law, "more within the expertise of the courts than within the expertise of [an agency]"). The court of appeals below acknowledged that in *Harmon* the Tenth Circuit disagreed with Fifth Circuit precedent in this regard. 19 F.3d at 1047 (A-31). *See also Koray v. Sizer*, 21 F.3d 558, 562 (3d Cir. 1994) (internal U.S. Bureau of Prisons guidelines respecting statutory interpretation for computing prisoners' good-time credit not entitled to same deference as published regulations); *Marshall v. Rosemont, Inc.*, 584 F.2d 319, 321 (9th Cir. 1978) (no "conclusive mystique" in agency's informal publications).

### C. The Court of Appeals' Rationale for Finding Preemption of State Homestead Laws Based Upon Regulations Admittedly Vague as to Intent to Preempt Threatens to Alter the Balance of Federal/State Powers.

Preemption should not be accomplished inadvertently. Clarity and specificity are necessary both to inform federal agencies of the subjects for which they are responsible and to give states and members of the public fair notice of applicable law.

Federal agency functionaries should not be permitted extra-legally to effectuate their personal agendas respecting substantive law by changing the law through informal administrative devices such as the FHLBB deputy general counsel's letter here. (A-77 *et seq.*). Such letters evade the requisite open debate, whether the forum for such debate be Congress, *see Chevron*, 467 U.S. at 866, or the notice and comment phase of formal rulemaking, *see* 5 U.S.C. § 553 (1988) subsecs. (b) (public notice of proposed rules) and (c) (opportunity

to comment on proposed rules). Thus, bureaucrats who are not answerable to the public try to effect preemption while evading the expression of legitimate state concerns respecting preemption. This increasingly common administrative practice constitutes preemption by stealth. It will continue unless this Court condemns it and restores the proper balance of federal and state powers.

There is a compelling need for review of this case by this Court. Here, OTS obtained the Fifth Circuit's ratification of OTS' secret preemption of Texas' family property laws. No subject more directly touches upon the American Dream. In few other fields of law has this Court been more deferential to the legitimate regulatory interests of states. *See Yazell*. While the court of appeals attempted to keep its decision narrow (applicable only to two types of AMTs), the court's approach to preemption, and the logical reach of its decision, threaten to upset the proper balance of federal and state powers: OTS can now assert that in hindsight the vague 1984 FHLBB regulation preempted a broad range of state laws regulating home ownership, secured transactions, and the public health and safety whenever federal savings associations or other housing creditors are operating.

The decision below allows any federal agency, as did FHLBB and OTS here, to adopt a vague, general regulation within the scope of its subject matter jurisdiction, and later informally opine that such regulation preempted a traditionally state-regulated field of law that incidentally affects the same subject matter as the general federal regulation.

Federal preemption of state laws respecting matters traditionally regulated by the states can only be accomplished through specific federal laws or regulations that accomplish that result. *Yazell* (Texas homestead law not preempted absent specific federal statute or regulation). The primary responsibility for overruling questionable federal agency actions, and thereby reconciling "competing views of the public interest," rests with the "political branches" rather than the judiciary. *Chevron*, 467 U.S.

at 866, *quoting TVA v. Hill*, 437 U.S.153, 195 (1978). However, the political branches cannot perform the vital public function of policing the federal bureaucracy if the bureaucracy makes its fundamental rules in secret.

If, as the court of appeals concluded, the 1984 FHLBB regulation did indeed preempt state homestead exemptions on the grounds that such exemptions were state laws "purporting to address the subject of the operations of a Federal association," former 12 C.F.R. § 545.2 (1984), this preemption was a well kept secret. A recent comprehensive legal study mentions no preemption of state homestead laws. *See* Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N. Car. L. Rev. 293, 323-34 (1993). In no reported case has any federal savings association or other housing creditor asserted preemption to overcome a defense grounded on any state's homestead exemption laws. Congress has enacted tax legislation strongly suggesting that branch of government believes that Texas homestead exemption subsists unpreempted. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, § 105(c)(8) (Nov. 10, 1988), codified at 26 U.S.C. § 163(h)(4)(C)(Supp. IV 1992)(permitting Texas taxpayers to deduct interest payments on consumer loans secured by invalid deeds of trust on consumers' residence).[6] Moreover, in every Texas Legislature session since 1979, financial institutions have attempted unsuccessfully to remove the homestead exemption from the Texas constitution –

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[6] The legislative history of this provision shows that Congress passed it precisely to avoid unfairly penalizing Texans respecting tax deductions simply because of the state's homestead exemption. *See* S. Rep. No. 445, 102nd Cong., 2d Sess. (1988), *reprinted*, 1988 U.S.C.C.A.N. 4515, 4516. The court of appeals appears to refer to this legislation when in its opinion it says, ". . . the persuasive force of the FHLBB Letter is not enhanced by the agency's failure to consider these acts of Congress suggesting the continued validity of Texas homestead law . . .." 19 F.3d at 1049.

and failed. [Texas] House Research Organization, Special Legislative Report: Second Mortgages and the Texas Homestead Exemption 19, 34-35 (Dec. 21, 1988) (R. 3:475). Significantly, the issue of preemption by OTS never arose during these attempts to alter Texas laws.

While the homestead exemption has roots deep in Texas history,[7] this is not just an issue of concern to Texas.[8] The Texas homestead exemption is different in degree, not kind, from other states' exemptions. The main difference is that the Texas exemption is non-waivable.

Moreover, the reasoning of the court of appeals in this case threatens not merely the homestead laws of all states that have such laws, but many additional state laws that arguably "address the subject of the operations of a Federal association," 19 F.3d at 1042 (A-18-19), *quoting* former 12 C.F.R. 545.2 (1984), or which "'*indirectly*' restrict[ ] the ability of federal savings associations to engage in graduated payment or reverse annuity mortgages." 19 F.3d at 1045 (A-25), *quoting* former 12 C.F.R. §

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[7] Texas homestead law is deeply embedded in the state's cultural traditions and legal history. The concept of a homestead — real property that receives special protection because it is the family home — originated in 1829 in the Mexican state of Coahuila y Texas, as Texas was then called. Joseph W. McKnight, *Protection of the Family Home From Seizure by Creditors: the Sources and Evolution of a Legal Principle*, 86 S.W. Hist. Q. 369, 369-70 (1983). The family homestead exemption has been in every Texas constitution since annexation to the Union, and before annexation in Republic of Texas statutes *Id.*, at 391-95.

[8] The family homestead exemption spread from Texas to the other states and beyond. McKnight, *supra*, at 369, 397. More than forty states have some form of homestead exemption today. *See generally*, 7 COLLIER ON BANKRUPTCY, *passim* (L. King ed. 15th ed. 1994)(collecting and discussing state exemption laws).

545.6-4(a)(2) (1982) (emphasis added).[9] For example, virtually all states have filing procedures for perfecting security interests in real property. These requirements would "indirectly" restrict a federal savings association's ability to enforce an unperfected security interest in real property arising from an AMT as against another creditor with a perfected security interest in the same property. The court of appeals' decision would permit such associations to assert the outrageous argument that the seniority of their liens are not subject to state filing laws.

The court of appeals turns this Court's standard for finding preemption on its head. Federal agency regulations are generally presumed *not* to preempt state laws. *See Gregory v. Ashcroft*, 501 U.S. 452, __, 111 S. Ct. 1395, 2401 (1991) (heightened scrutiny and plain statement required before finding preemption affecting federal balance of powers); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (real property law of special concern to states). To accomplish preemption pursuant to a delegation of congressional authority, an agency's regulations must more than merely "touch upon" or "relate to" the subject of the state law. *CSX Transportation, Inc. v. Eastwood*, 113 S. Ct. 1732, 1737-38 (1993) (determining whether Secretary of Transportation's railroad crossing safety standards preempted state standards). "[P]reemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* Federal agency regulations will not be found to preempt state laws that have merely an incidental effect within the subject matter encompassed by the federal regulation. *North Dakota v. United States*, 495 U.S. 423, 442 (1990)(military regulations requiring competitive bidding do not preempt state liquor laws that had merely *incidental effect* of increasing military liquor costs).

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[9] The court cited this and other superseded regulations because it concluded that no intervening FHLBB or OTS regulations substantively changed the provisions of the older rules. *See* 19 F.3d at 1045 (A-26).

The underpinning of the court of appeals' opinion was that any state laws impinging on federal savings associations' "operations" are invalid. Such laws are not limited to homestead exemptions. States regulate the "operations" of federal savings associations just as they do other businesses, in a number of ways, ranging from zoning regulations, building and fire codes, health inspections, and even speed limits for financial institutions' vehicles. Such necessary and proper regulations more directly affect the institutions "operations" than do homestead exemptions. The approach of the court of appeals in this case to the issue of preemption by vague regulations places in question the validity of these legitimate state regulatory measures.

Texas' homestead exemption does not even relate directly to the "operations" of federal savings associations. The homestead exemption merely restricts a home owner's ability to alienate an interest in real property. If the "vague" OTS regulations could preempt a state's homestead exemption on the theory that this restriction relates to federal savings association "operations," then OTS also could assert with equal force that the same general and vague OTS regulation has preempted state laws that establish the priority of liens in the order in which they are perfected under state law procedures. Under the court of appeals' reasoning, relegating a federal savings association's security interest in real property to a second lien merely because another creditor perfected a earlier lien would interfere with the financial institution's "operations." Thus, federal associations, and under the Parity Act other housing creditors, should always be able to take liens on real property senior to the security interests of the land owner's other creditors.

This suggestion is refuted however, by the plain language of 12 C.F.R. § 545.32(b)(4) (1994) (A-75) (enforcement of security interest in real property determined by state law), upon which the district court relied below. The court of appeals describes this regulation as "[t]he fly in the ointment," 19 F.3d at 1046 (A-28), but it is the *only* OTS regulatory provision that on its face relates

to the subject of the homestead exemption. The court interprets section 545.32(b)(4) not to mean what it plainly says based on the provision's "history." 19 F.3d at 1046 (A-28). However, where a law's language is clear on its face, courts should not resort to extrinsic aids in determining its meaning. *See Dewsnup v. Timm*, 112 S. Ct. 773 (1992) (construing Bankruptcy Code provision). This rule of statutory construction should apply equally to the interpretation of formal regulations, which have the force and effect of law. *See Black & Decker Corp. v. Commissioner*, 986 F.2d 60, 65 (4th Cir. 1993) (same canons of construction apply to regulations as to statutes). Significantly, this key regulatory provision was not even mentioned in the 1989 advisory letter upon which the court of appeals also relied, 19 F.3d at 1047-48 (A-32), - a letter which the court conceded was "not without flaws." 19 F.3d at 1048 (A-32).

The OTS regulations are not merely "vague" respecting the preemption of state homestead exemptions, as the court below acknowledged. 19 F.3d at 1044 (A-24). They are non-existent. Not once do the terms "homestead," "exemption," or any equivalent of either, appear in any of the regulatory materials upon which that court relied. The only regulatory language remotely addressing the homestead issue is the text expressing an intent to preempt any state laws "purporting to address the subject of the operations of a Federal association." *See* 12 C.F.R. § 545.2 (1994) (A-74).

In *United States v. Yazell*, 382 U.S. at 349-51, this Court refused to permit the federal Small Business Administration to enforce a note against a Texas married couple where the note would have been unenforceable under Texas laws respecting coverture and homestead exemptions. Resolving the case in terms of "the continuing problem of the interaction of federal and state laws in our complex federal system," 382 U.S. at 342, Justice Fortas wrote the majority opinion, recognizing that Texas has a strong interest in preserving its homestead laws, and asserted,

> no contention will or can be made that the United States may by judicial fiat collect its loan with total disregard for state laws such as homestead exemptions. [Footnote omitted]. Accordingly, generalities as to the paramountcy of the federal interest do not lead inevitably to the result the Government seeks.

382 U.S. at 348-49. The Court therefore held that absent a "specific" law the Court would not find preemption, stressing that "[b]oth theory and the precedents of this Court teach us solicitude for state interests, *particularly in the field of family and family property arrangements*," absent *clear and substantial interests of the National Government, which cannot be served consistently with respect to such state interests, [and which] will suffer major damage if state law is applied.* 382 U.S. at 352 (emphases added).

This Court has construed a FHLBB regulation, which *did* manifest an explicit preemptive intent, to preempt state laws respecting due-on-sale clauses in mortgages, even while recognizing that real property law is a matter of special concern to states, as to which preemption should not lightly be found. *See de la Cuesta*, 458 U.S. at 153-54 (regulation's intent to preempt was "unambiguous" and "unequivocally expressed by the agency"). Unlike the California due-on-sale clause prohibition that this Court found to be preempted by the specific regulations construed in *de la Cuesta*, the Texas homestead exemption is not a term in a loan document issued by a federally chartered institution; it is a limitation on an owner's right to encumber his property or have it subjected to forced sale. That limitation requires no "operations" of the financial institution for its effectiveness, any more than does a state's fraudulent transfer law

— another example of state restraints on the alienation of property. Thus, *de la Cuesta* is not controlling here.[10]

Finally, the OTS regulation that purportedly preempts Texas law would leave significant gaps in the state law that it would displace. Nothing in OTS regulations fills those gaps. There is no federal general common homestead exemption law. *In Re Bubert*, 61 B.R. 362, 366 (W.D. Tex. 1986), *aff'd*, 809 F.2d 259 (5th Cir. 1987). The absence of any substitute substantive law to replace the assertedly preempted law is the strongest evidence that there in fact was no preemption. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (absence of a federal regulatory scheme to replace state law indicates that congressional intent to preempt is unclear); Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N. Car. L. Rev. at 329.

This Court cited the absence of any law replacing the Texas family property laws that the Small Business Administration would have preempted in *Yazell* as a substantial consideration in finding that the state provisions, including homestead exemptions, were not preempted in that case. 382 U.S. at 352-53.

The *Yazell* Court wisely observed that Texas' homestead exemption law does not exist in a vacuum. *Id.* It is but one strand of a complex web of state laws governing property rights. Voiding those laws creates the need to solve the problems that the homestead laws addressed. No federal laws or regulation provides these solutions. For example, Texas is a community property

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[10] In addition, *de la Cuesta* construed a FHLBB regulation that expressly established the law applicable to due-on-sale clauses in mortgages issued by federally chartered financial institutions. There is no such express regulation here. *See* 458 U.S. at 147. Moreover, the FHLBB had explicitly stated in the preamble to the regulation in question that it intended to preempt state laws imposing additional limitations on the enforceability of such due-on-sale clauses. *Id.* The regulations at issue in the instant case are devoid of any similar specificity or clarity.

state. *See* TEX. CONST. art. XVI § 15; TEX. FAM. CODE ANN. §§ 5.01-5.27 (Vernon 1993). Under Texas law as written, neither spouse could grant a non-purchase money security interest in the family homestead. If Texas law is preempted as the court of appeals says, can one spouse grant such a security interest without the consent of the other? In 1966, in *Yazell*, this Court resolved a similar question with the proper solution: State law was not preempted. The Court should reach the same result now.

## CONCLUSION[11]

The petition for a writ of certiorari should be granted.

Respectfully submitted:

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July 1994

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[11] The State has assumed in this petition that OTS has statutory authority to preempt state homestead protections, and has confined its argument to whether OTS properly exercised that assumed authority. The latter is a far easier question to answer, and permits resolution of this case without addressing the broader question of statutory authority. However, the State's view remains that OTS lacks statutory authority.

FILED
94 209 JUL 28 1994
OFFICE OF THE CLERK

No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**
**October Term, 1994**

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**DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER,**

***Petitioners,***

**v.**

**FIRST GIBRALTAR BANK, FSB, AND BENEFICIAL TEXAS, INC.,**

***Respondents.***

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# ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI, APPENDIX

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**July 1994**

## APPENDIX - TABLE OF CONTENTS

*First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir. 1994) . . . . . A-1

*First Gibraltar Bank, FSB v. Morales*, 815 F. Supp. 1008 (W.D. Tex. 1993) . . . . . A-48

Texas Constitution, Art. XVI, § 50 . . . . . A-68

Texas Property Code § 41.001. Interests in Land Exempt from Seizure . . . . . A-69
Texas Property Code § 41.002. Definition of Homestead . . . . . A-69

12 U.S.C. § 1462(5) . . . . . A-70
12 U.S.C. § 1464 (excerpts) . . . . . A-71
12 U.S.C. § 3802(1) . . . . . A-72
12 U.S.C. § 3803 (excerpts) . . . . . A-72
12 U.S.C. § 3806(d) (excerpts) . . . . . A-73

12 C.F.R. § 545.2 . . . . . A-74
12 C.F.R. § 545.32(c) . . . . . A-74
12 C.F.R. § 545.33 (excerpts) . . . . . A-75
12 C.F.R. § 545.6-4a (excerpts) . . . . . A-76

Letter from Jack D. Smith, Deputy General Counsel, FHLBB, to John A. Maxim, Associate General Counsel, Dept. of Housing & Urban Dev. (Apr. 4, 1989), *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 82,502, at 61,707-08 (Aug. 4, 1989) . . . . . A-77

**FIRST GIBRALTAR BANK, FSB, and Beneficial Texas, Inc., Plaintiffs-Appellants,**

**v.**

**Dan MORALES, Atty. General, as Attorney General for the State of Texas, Defendant-Appellee.**

**No. 93-8170.**

**United States Court of Appeals, Fifth Circuit.**

**April 29, 1994.**

**Appeal from the United States District Court for the Western District of Texas.**

**Before POLITZ, Chief Judge, KING and DAVIS, Circuit Judges.**

**KING, Circuit Judge:**

**The district court entered summary judgment in favor of the defendant in this action for declaratory judgment and injunctive relief brought by First Gibraltar Bank, FSB, and Beneficial Texas, Inc. The issue presented for our determination is whether federal statutes and regulations have preempted Texas homestead law to the extent that it prohibits lenders from enforcing liens on home equity created in reverse annuity mortgages or line of credit conversion mortgages.**

## I. BACKGROUND

**First Gibraltar Bank, FSB (First Gibraltar), is a federally chartered savings bank; Beneficial Texas, Inc. (Beneficial), is a non-federally chartered financial services corporation that is licensed to do business in Texas. Together, First Gibraltar and Beneficial (the banks) filed a complaint for declaratory judgment and injunctive relief in**

federal district court against Dan Morales as attorney general for the state of Texas and Albert Endsley as Texas Consumer Credit Commissioner (referred to herein collectively as "the state of Texas"). The banks requested the district court (1) to declare that federal law preempts Texas homestead law to the extent that Texas law prohibits federal savings associations from enforcing liens taken in alternative mortgage transactions secured by a homeowner's equity such as reverse annuity mortgages and line of credit conversion mortgages, (2) to declare that this federal preemption also extends to state-chartered institutions under the Parity Act, and (3) to order appropriate injunctive relief in conjunction with those declarations.

Both sides moved for summary judgment. After oral argument, the district court denied the plaintiffs' motion and granted summary judgment in favor of the defendants. The court's order is reported as *First Gibraltar Bank, FSB, v. Morales,* 815 F.Supp. 1008 (W.D.Tex.1993). This appeal followed, and numerous amici curiae have filed briefs in this court. Among the amici is the OTS itself, which has filed a brief in support of the banks' position.

## II. STANDARD OF REVIEW

A district court's conclusions of law are reviewable de novo. *Prudhomme v. Tenneco Oil Co.*, 955 F.2d 390, 392 (5th Cir.), *cert. denied,* ——— U.S. ———, 113 S.Ct. 84, 121 L.Ed.2d 48 (1992).

We are required to give deference to an executive agency's interpretation of a statute or regulation that the agency is responsible for administering. Of course, if the intent of Congress is clear, that intent will trump any agency interpretation to the contrary. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842,

104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *Hawkins v. Agricultural Marketing Serv., Dep't. of Agric.*, 10 F.3d 1125, 1129 (5th Cir. 1993). If Congress did not directly address the precise question at issue, however, we must defer to the agency's interpretation of that statute as expressed in its regulations unless those regulations are arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82. Deference is even more clearly in order when an agency construction of its own regulations is involved; the agency construction is controlling unless it is plainly erroneous or inconsistent with the regulation. *Stinson v. United States*, ——— U.S. ———, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993); *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

## III. ANALYSIS

Before proceeding with our analysis of the preemption issues presented by this case, we will first briefly survey the legal backdrop against which this case arises. A review of Texas homestead law and the legal features of reverse annuity mortgages and line of credit conversion mortgages thus follows. Additionally, the state of Texas has raised a ripeness issue that we address before reaching the merits of this controversy.

### A. BACKGROUND

#### 1. *Texas Homestead Law*

The "homestead exemption" is the well-known provision of Texas law that protects certain real property interests from foreclosure and forced sale for the payment of debts, with very few exceptions. The exemption is guaranteed in the Texas Constitution, which provides in pertinent part:

> The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon.... No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided....

TEX. CONST. art. XVI, § 50; *see also* TEX.PROP.CODE ANN. § 41.001 (West Supp.1994) (mirroring the provisions of TEX. CONST. art. XVI, § 50). The Texas Constitution further establishes that the key defining feature of a homestead is that the property is "used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family." TEX. CONST. art. XVI, § 51. A person claiming homestead rights in property has the burden of proving both overt acts of homestead usage and intent to claim the land as a homestead. *Kennard v. MBank Waco, N.A. (In re Kennard)*, 970 F.2d 1455, 1458 (5th Cir. 1992); *see also Gregory v. Sunbelt Sav., F.S.B.*, 835 S.W.2d 155, 158 (Tex.App.—Dallas 1992, writ denied) ("The homestead character of property can be established prior to actual occupancy when the owner intends to improve and occupy the premises as a homestead."). It should be noted that this protection by no means embraces *all* of a home owner's property; the exemption may be claimed on a maximum of 200 acres of land and improvements in rural areas or one acre of land and improvements in a city, town, or village. TEX. CONST. art. XVI, § 51.

Strong legal protection of the homestead from foreclosure has long been viewed as an important public policy in Texas. As Chief Justice Hemphill of the Texas Supreme Court once wrote,

> The object of such exemption is to confer on the beneficiary a home as an asylum, a refuge which cannot be invaded nor its tranquility or serenity disturbed, and in which may be nurtured and cherished those feelings of individual independence which lie at the foundation and are essential to the permanency of our institutions.

*Wood v. Wheeler*, 7 Tex. 13, 22 (1851). As the banks correctly point out, however, this protection is not cost-free. The homestead exemption effectively prevents home owners from converting their home equity into liquid assets through secured borrowing. *See* 2 GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 790 (no date) (noting that the homestead exemption "effectively prevents mortgaging the homestead to meet a financial emergency; the only source of funds thus may be outright sale of the homestead"). The banks are of the view that lending institutions also bear part of the cost of Texas' homestead laws because those laws prevent them from engaging in certain mortgage lending activities.

### 2. *Reverse Annuity Mortgages*

In their complaint, the banks sought a declaration that

> [federal statutes] preempt those portions of the Texas homestead law that prevent federally-chartered savings and loan associations from creating

enforceable liens on Texas homesteads otherwise permitted by federal law and regulations.

The banks also sought a declaration that federal law gives housing creditors in Texas other than federal savings associations the same right "to make, purchase and enforce alternative mortgage transactions" as possessed by federal associations. The banks expressly denied that they were seeking a declaration that Texas homestead law had been preempted in its entirety, and they admitted that Texas homestead law would continue to apply in such contexts as "fixed-rate, fixed-term home loan transactions, federal bankruptcies [in which state exemptions are claimed], and judgment creditor claims against individual debtors."

We note at the outset that the term used by the parties and the court below, "alternative mortgage transaction" (AMT), is a broad catch-all term for all manner of mortgage instruments that do not conform to the traditional fully-amortized, fixed-interest-rate mortgage loan. These AMTs include such instruments as the adjustable interest rate mortgage and the graduated payment mortgage. *See generally* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 1000-13 (4th ed. 1992). Through their motions for summary judgment and on this appeal, the parties have made clear that their dispute does not concern these now-familiar alternative mortgage instruments but rather focuses on AMTs that are directly foreclosed by the impact of the Texas homestead law, namely the "reverse annuity mortgage" (RAM) and the "line of credit conversion mortgage," which is a variant of the RAM.

We shall therefore limit our preemption analysis and our decision to the two types of alternative mortgage

instruments specifically enumerated by the banks, the RAM and the line of credit conversion mortgage. Black's Law Dictionary defines a RAM as

> [a] mortgage format under which the mortgage loan proceeds are disbursed periodically over a long time period to provide regular income for the borrower-mortgagor. The loan will usually be repair in a lump sum when the mortgagor dies or the property is sold.

BLACK'S LAW DICTIONARY 1011 (6th ed. 1990). Although the regulations adopted by the OTS do not mention the RAM by name, they do describe that mortgage instrument in terms consistent with the above definition: "The loan contract may provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made." 12 C.F.R. § 545.33(a) (1993). We conclude that a RAM is a mortgage instrument that provides for periodic payments from the mortgagee to the mortgagor, with the loan being secured by the mortgagor's equity in real property. The line of credit conversion mortgage is a variant of the RAM in which the mortgagor is provided with a line of credit so that he may receive payments on demand rather than regularly-scheduled payments.

The parties agree that a lien taken on a homestead in a RAM or line of credit conversion mortgage is not enforceable under Texas homestead law.

### B. JUSTICIABLE CASE OR CONTROVERSY

Before addressing the merits of this case, we must pass on the state of Texas' argument that this action must be dismissed for lack of subject matter jurisdiction. Under the Declaratory Judgment Act, a federal district court has the discretionary power to enter a declaratory judgment "[i]n a

case of actual controversy within its jurisdiction." 28 U.S.C. § 2201. The state of Texas, in its response to the banks' motion for summary judgment, argued that the district court should deny summary judgment because the banks had not shown an actual controversy within the meaning of § 2201.

The Supreme Court has told us that the district courts are without the power to grant declaratory relief unless an actual controversy exists. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272, 61 S.Ct. 510, 511 85 L.Ed. 826 (1941). The question, which is admittedly one of degree, is "whether the controversy is of sufficient immediacy and reality to permit a declaratory judgment." 10A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2757 (1983); *see also Middle South Energy, Inc. v. City of New Orleans,* 800 F.2d 488, 490 (5th Cir. 1986) ("A federal court may not issue a declaratory judgment unless there exists ... a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests."). The district court in the instant case implicitly resolved this issue in favor of the plaintiffs, noting that "[p]laintiffs fear that if they make, purchase or enforce alternative mortgage transactions, Defendants will enjoin their actions, prosecute them under Texas law and revoke their corporate charter or license." *First Gibraltar Bank,* 815 F.Supp. at 1010. The court below also noted that the Texas Consumer Credit Commissioner issued an opinion in 1986 that such loans may violate the Texas Deceptive Trade Practices Act, TEX.BUS. & COMM.CODE § 17.41-.63 (West 1987 and West Supp.1994), and that the Texas Attorney General issued an opinion in 1990 that the federal laws now relied upon by the banks had not preempted any

aspect of Texas homestead law. *First Gibraltar Bank*, 815 F.Supp. at 1010, 1011.

The state of Texas contends that the plaintiffs have failed to show a real and immediate threat of injury and that "[i]t is purely a matter of conjecture whether the State will ... ever file suit against the [plaintiffs] on the theory on which the [plaintiffs] requested a declaration." For support, the state of Texas relies on our opinion in *Texas v. West Publishing Co.*, 882 F.2d 171, 175 (5th Cir.1989), *cert. denied*, 493 U.S. 1058, 110 S.Ct. 869, 107 L.Ed.2d 953 (1990), in which we applied a two-pronged test fashioned by the Federal Circuit to determine whether an "actual controversy" existed in the context of an intellectual property case. Under that test, the declaratory plaintiff must show both a real and reasonable apprehension of litigation and a course of conduct that brings it into adversarial conflict with the declaratory defendant. *Id.* We agree with the plaintiffs, however, that *West Publishing* is not controlling; the test we applied in that case was adopted specifically for its intellectual property context, and we decline to extend it to this alleged clash between state law and federal right.

We find the case of *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), particularly instructive. That case involved, *inter alia*, a California statute that imposed a moratorium on the certification of new nuclear power plants until the state energy commission found that a method of permanent disposal of high-level nuclear wastes had been successfully developed and had received federal approval. *Id.* at 198, 103 S.Ct. at 1719. The plaintiff utilities filed an action seeking a declaratory

judgment that this statute had been preempted by the federal Atomic Energy Act. *Id.* The Court agreed with the plaintiffs that the aspect of their suit involving this statute was ripe for judicial review. *Id.* at 200, 103 S.Ct. at 1720. Particularly important to the Court's determination were the facts that "[t]he question of pre-emption is predominately legal" and therefore fit for judicial decision, and that "postponement of decision would likely work substantial hardship on the utilities." *Id.* at 201, 103 S.Ct. at 1720-21. We conclude that the banks in the instant action are in much the same position as the utilities were in *Pacific Gas.* Although the banks could simply proceed on the assumption that their view of federal preemption of Texas homestead law is correct, they would risk incurring significant losses should their legal theory prove incorrect. The potential consequences to the banks are sufficiently concrete to support an action for declaratory judgment. *See Whitney v. Heckler*, 780 F.2d 963, 969 n. 6 (11th Cir.) ("[A]n issue is ripe for judicial review when the challenging party is placed in the dilemma of incurring the disadvantages of complying or risking penalties for noncompliance."), *cert. denied*, 479 U.S. 813, 107 S.Ct. 65, 93 L.Ed.2d 23 (1986).

We conclude that the district court's decision not to dismiss this declaratory judgment action for lack of an "actual controversy" was not erroneous.

### C. PREEMPTION

We now address the merits of the banks' argument that federal preemption of Texas homestead law has occurred insofar as Texas law prohibits the enforcement of liens acquired in RAMs or line of credit conversion mortgages. Before we do so, we again emphasize that the question before us is not whether federal law has preempted

Texas homestead law in its entirety, but only whether Texas homestead law has been preempted with respect to RAMs and line of credit conversion mortgages. We first examine the contours of federal preemption doctrine before surveying the legal materials relied upon by the banks in this action.

1. *Federal Preemption Doctrine*

It is unquestioned that Congress has the authority, in the exercise of its Article I powers, to preempt state laws by virtue of the Supremacy Clause of the Constitution. U.S. CONST. art. VI, cl. 2; *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 109 S.Ct. 1661, 1664, 104 L.Ed.2d 86 (1989). Determining when such preemption has in fact occurred, however, is not always a simple task. Preemption is, of course, most easily recognized when Congress displaces state law "by so stating in express terms." *Pacific Gas*, 461 U.S. at 203, 103 S.Ct. at 1722. Federal preemption also occurs when an "actual conflict" develops between federal and state law. *Id.* at 204, 103 S.Ct. at 1722. The Supreme Court has described actual conflict as including situations in which compliance with both federal and state law is a "physical impossibility" and cases in which state law obstructs the "accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted). A third variety of preemption arises when a scheme of federal legislation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.*

In approaching a preemption question, we must keep in mind that all three types of preemption are premised on a determination of congressional intent to displace the police power of the states. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1899, 90 L.Ed.2d

369 (1986) ("The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law.". When Congress legislates in a field of activity traditionally regulated by the states, we must start with a presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *ARC Am.*, 490 U.S. at 101, 109 S.Ct. at 1665. Real property law has been recognized by the Supreme Court as a matter of special concern to the states. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Although the Court has said that the general principles governing the three types of preemption analysis are applicable even in areas of the law that are "matter[s] of special concern to the States," *id.*, the Court has also indicated that a kind of heightened scrutiny in the form of a "plain statement rule" is required before we may find federal preemption of state power in "traditionally sensitive areas, such as legislation affecting the federal balance," *Gregory v. Ashcroft*, 501 U.S. 452, ———, 111 S.Ct. 2395, 2401, 115 L.Ed.2d 410 (1991) (citations omitted). It has been noted that federal courts are generally "reluctan[t] to infer preemption in ambiguous cases." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 (2d ed. 1988).

State law can be preempted by regulations promulgated by federal agencies acting within the scope of their congressionally delegated authority as well as by federal legislation. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1898; *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022. "A pre-emptive regulation's force does not depend on express congressional authorization to

displace state law; moreover, whether the [agency] failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive." *de la Cuesta,* 458 U.S. at 154, 102 S.Ct. at 3023. Agency decisions to preempt state law are entitled to judicial deference, and if an agency's choice to preempt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York v. FCC,* 486 U.S. 57, 64, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988) (citing *United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961). In *de la Cuesta,* the Court made clear that cases of administrative preemption require consideration of two questions: (1) did the agency intend to preempt the state law in question, and (2) if so, was that action within the scope of the agency's delegated authority? *de la Cuesta,* 458 U.S. at 154, 102 S.Ct. at 302.

The state of Texas strongly urges that we should apply the "plain statement rule" of *Gregory* to the instant case. We cannot agree. In *Gregory,* the Supreme Court held that the federal Age Discrimination in Employment Act (ADEA) did not preempt a provision of the Missouri Constitution providing for mandatory retirement of Missouri state judges at age seventy. *Gregory,* ——— U.S. at ———, 111 S.Ct. at 2408. Because Congress did not unambiguously intend to include state judges within the ambit of the ADEA, the Court declined to find any intent to preempt on Congress' part. *Id.* at ———, 111 S.Ct. at 2406. Although the Court did not clearly define the circumstances under which this plain statement rule should

be applied, it did state that Missouri's law regarding the qualifications of state judges "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Id.* at ———, 111 S.Ct. at 2400; *see also id.* at ———, 111 S.Ct. at 2402 (describing the power to determine the qualifications of state officials as lying "at the heart of representative government"). Although the regulation of real property may be a matter of special concern to the states, *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022, it does not seem to us to strike "at the heart of representative government" in the same way that the ADEA did in *Gregory*. *See Reich v. New York*, 3 F.3d 581, 589-90 (2d Cir.1993) (holding that a federal requirement that states pay overtime to their police officers did not "strike at the heart of representative government" (internal quotations omitted)), *cert. denied*, ——— U.S. ———, 114 S.Ct. 1187, ——— L.Ed.2d ——— (1994); *Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir.1993) (holding that *Gregory*'s plain statement rule did not apply to state mandatory retirement laws pertaining to police officers).

Our holding that *Gregory* is inapposite to the instant case, however, in no way changes the presumption that historic police powers of the States are not superseded by federal law unless preemption is the clear and manifest purpose of Congress, or, in this case, of the rule-making agency. *ARC Am.*, 490 U.S. at 101, 109 S.Ct. at 1665. With this general principle in mind, we turn to the legal materials on which the banks rely as preempting the homestead law of Texas.

### 2. *Law Governing Federal Savings Associations*

#### a. The Law Before 1983

The banks first direct our attention to the Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461-1468c. HOLA, which was originally passed during the Great Depression as an emergency relief measure, provided for the creation of a system of federal savings and loan associations regulated by a single federal agency, the Federal Home Loan Bank Board (FHLBB). *de la Cuesta*, 458 U.S. at 159-60, 102 S.Ct. at 3025-26. In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act, which amended the HOLA by dissolving the FHLBB and creating the OTS in its place. 12 U.S.C. §§ 1462a-1464; *First Gibraltar Bank*, 815 F.Supp. at 1013. The HOLA authorizes federal savings associations to make loans on the security of liens upon residential real property to the extent specified in regulations of the Director of the OTS. 12 U.S.C. § 1464(c)(1)(B). The statute also authorizes federal savings associations to make loans on the security of liens upon nonresidential real property, with certain limitations based upon the capital of the particular savings association. 12 U.S.C. § 1464(c)(2)(B).

In 1978, the FHLBB first authorized federal savings associations to use three new types of mortgage instruments: the variable rate mortgage, the graduated payment mortgage, and the reverse annuity mortgage. 43 Fed.Reg. 59,336, 59,336 (1978) ("The variable rate mortgage will ... be authorized on a state-by-state basis; the graduated payment mortgage and reverse-annuity mortgage are hereby authorized *nationwide*." (emphasis added)). The purpose of

the new regulations was "to meet the needs of homeowners during different phases of their financial life cycles." *Id.*

In 1981, the FHLBB promulgated a number of amendments regarding the lending authority of federal savings associations. One primary purpose of the amendments was to authorize those associations "to make, purchase, participate or otherwise deal in adjustable mortgage loan instruments, which permit adjustment of the interest rate." 46 Fed.Reg. 24,148, 24,148 (1981). The adjustable mortgage loan regulation, 12 C.F.R. § 545.6-4a, included an express preemption provision, which stated:

> This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase, participate, or otherwise deal in adjustable mortgage loans, or to directly or indirectly restrict such ability or right.

12 C.F.R. § 545.6-4a(a)(2) (1982). The commentary accompanying the new regulations noted, "This preemption has the effect of precluding the application of the laws of approximately 30 states prohibiting the charging of interest on interest." 46 Fed.Reg. 24,148, 24,151 (1981). We take note of these changes in the regulation of adjustable rate mortgages because, at the same time, the FHLBB took "the opportunity to amend 12 CFR 545.6-4, [authorizing] other alternative mortgage instruments, by inserting a similar preemption of inconsistent state law," *id.*, which provision read as follows:

> This regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations.... This exercise of the Board's authority

> is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase, or participate in the alternative mortgage instruments set forth in this section [namely graduated payment mortgages and reverse annuity mortgages], or to directly or indirectly restrict such ability.

12 C.F.R. § 545.6-4(a)(2) (1982).

Another significant development in this area of the law prior to 1983 occurred when the Supreme Court decided the *de la Cuesta* case on June 28, 1982. At issue was a FHLBB regulation providing that due-on-sale clauses in mortgage instruments entered into by federal savings associations "shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract." *de la Cuesta*, 458 U.S. at 147, 102 S.Ct. at 3019 (quoting 12 C.F.R. § 545.8-3(f) (1982)). The FHLBB stated in the preamble accompanying the final publication of the regulation that it intended to preempt any state laws imposing additional limitations on the enforceability of due-on-sale clauses. *Id.* (citing 41 Fed.Reg. 18,286, 18,287 (1976)).

The Court recognized that Congress may delegate its power to preempt state laws to federal agencies such as the FHLBB. *Id.* at 153, 154, 102 S.Ct. at 3022, 3022. The Court further stated that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive." *Id.* at 154, 102 S.Ct. at 3023. After stating these general principles, the

Court turned aside all of the appellees' arguments against preemption, concluding that any ambiguity in the regulation regarding the FHLBB's preemptive intent was dispelled by the accompanying preamble. *Id.* at 158 & n. 13, 102 S.Ct. at 3025 & n. 13. Having decided that the FHLBB's regulation did indeed conflict with state law, the Court next considered whether the agency had acted within its statutory authority in issuing the preemptive regulation. *Id.* at 159, 102 S.Ct. at 3025. The Court had little difficulty concluding that Congress had given the FHLBB this power in the "ample authority" conferred on the agency in the HOLA "to regulate the lending practices of federal savings and loans so as to further the Act's purposes." *Id.*

b. The Law Since 1983

In 1983, the FHLBB opted to discontinue its practice of promulgating regulations specifically empowering federal savings associations to act and to permit such associations to exercise all powers granted them by the HOLA, subject only to limitations contained in the regulations. 48 Fed.Reg. 23,032, 23,032 (1983). This revision of the prior regulatory scheme resulted in the deletion of sections providing specific lending authority (such as § 545.6-4), but the FHLBB emphasized that the deletion "d[id] not mean that any authority c[ould] no longer be exercised." *Id.*, *see* 12 C.F.R. § 545.1 (1984) ("A Federal association may exercise all authority granted it by the [HOLA] and its charter and bylaws, whether or not implemented specifically by Bank Board regulation, subject to the limitations and interpretations contained in this Part."). The provision concerning preemption was relocated to 12 C.F.R. § 545.2 (1984), and it provided that the regulations contained in § 545 are "preemptive of state law purporting to address the

subject of the operations of a Federal association." We note that this approach has been continued by the OTS; the current versions of 12 C.F.R. §§ 545.1 and 545.2 are essentially identical to their 1984 counterparts.

Regulatory limitations on the power of savings associations to make loans on the security of real estate are found in 12 C.F.R. § 545.32 (1993). That section authorizes federal savings associations to "originate, invest in, sell, purchase, service, participate, or otherwise deal in ... loans made on the security of residential or nonresidential real estate ... subject to the limitations of this part." 12 C.F.R. § 545.32(a) (1993). Section 545.32 further provides that,

> [s]ubject to the limitations in §§ 545.33 and 545.35 of this part, a real estate loan may be fully amortized, partially amortized, non-amortized, or a line-of-credit loan, and the loan contract may provide for the deferral and capitalization of a portion of the interest.

12 C.F.R. § 545.32(b)(4) (1993). In determining that federal preemption of Texas homestead law had not occurred, the district court relied largely on § 545.32(c)(2), which provides:

> (c) *Security property.* A loan is made on the security of real estate if:
>
> > (2) The security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent *pursuant to the law of the state in which the property is located*[.]

12 C.F.R. § 545.32(c)(2) (1993) (emphasis added).

The banks also bring to our attention some correspondence between the Department of Housing and

Urban Development (HUD) and the FHLBB. In 1988, HUD planned to implement a demonstration program in which it would insure some home equity conversion mortgages, and it sought an advisory opinion from the FHLBB as to whether its regulations had preempted Texas homestead law so as to make such mortgages enforceable in Texas by federal savings associations and state chartered associations. Deputy General Counsel for the FHLBB responded with an opinion letter dated August 4, 1989. We quote from that letter at length:

> Congress by statute has explicitly permitted Federal associations to secure loans with real estate. 12 U.S.C. § 1464(c)(1)(B). It is axiomatic that the authority to secure loans protects lenders in the event of default on such loans by foreclosing on the property constituting the security. State laws which prevent or otherwise restrict Federal associations from engaging in transactions involving such mortgages, are in conflict with Bank Board regulations.
>
> The Texas laws in question [i.e., the homestead exemption] clearly prevent Federal associations from exercising the authority granted to them by the HOLA and the Board's regulations. Therefore, this Office concludes that the constitution and statutes of Texas under review are "an obstacle to the accomplishment and execution of the purposes and objectives" of 12 C.F.R. pt. 545 to the extent that they prevent Federal associations from securing line of credit conversion mortgages with real estate consisting of homesteads, and foreclosing on such mortgages in the event of default. According to *de la Cuesta*, the HOLA authorizes the Board to enact regulations that preempt substantive state

real property laws purporting to govern the mortgage lending operations of Federal associations. *The regulatory history of 12 C.F.R. § 545 reveals that the Board exercised this authority to preempt state real property laws, insofar as reverse mortgages are concerned....*

> *[W]e opine that Federal associations are authorized to offer, and if the need arises, to foreclose upon line of credit conversion mortgages which are secured by Texas homesteads, despite contrary state law.*

FHLBB General Counsel Opinion Letter, Fed.Banking L.Rep. (CCH) ¶82,502, at 61,707-08 (August 4, 1989) (footnotes omitted) (emphases added) [hereinafter FHLBB Letter].

The banks contend, with the full support of the OTS as amicus curiae, that these materials, taken together, demonstrate the intention of the FHLBB/OTS to preempt Texas homestead law insofar as it would prohibit federal savings associations from entering into and enforcing RAMs and line of credit conversion mortgages.

3. *Law Governing Non-Federally Chartered Savings Institutions*

The basis for Beneficial's argument that non-federally chartered savings associations also receive the benefit of federal preemption of Texas homestead law is Chapter 39 of Title 12 of the United States Code, formerly designated as the Alternative Mortgage Transaction Parity Act of 1982. 12 U.S.C. §§ 3801-06. The express purpose of the Parity Act is

> to eliminate the discriminatory impact that [federal] regulations [authorizing federal savings associations to enter into AMTs] have upon nonfederally chartered housing creditors and provide them with

> parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by ... Federal agencies.

12 U.S.C. § 3801(b). "Housing creditors" is broadly defined to include, *inter alia*, "any person who regularly makes loans, credit sales, or advances secured by interests" in residential properties. 12 U.S.C. § 3802(2)(C). State chartered housing creditors that are neither banks nor credit unions are authorized to engage in AMT lending in accordance with OTS regulations governing such transactions in the federal savings association context. 12 U.S.C. § 3803(a)(3). The Parity Act specifically preempts state law with respect to such authorized transactions, providing that "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any state constitution, law, or regulation." 12 U.S.C. § 3803(c). The States were given a three-year period during which to "opt out" of the Parity Act's operations, 12 U.S.C. § 3804, but the state of Texas does not argue that it did so. We find it very significant that RAMs were explicitly authorized by the FHLBB under the heading "Alternative Mortgage Instruments" at the time the Parity Act was enacted. 12 C.F.R. § 545.6-4(a), (c) (1982).

The OTS has implemented the Parity Act in 12 C.F.R. § 545.33(f) (1993), which provides in pertinent part as follows:

> Pursuant to [the Parity Act], housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions (as defined by [12 U.S.C. § 3802] and as

> further defined and described by applicable regulations identified herein) notwithstanding any state constitution, law or regulation. In accordance with section 807(b) of Pub.L. 97-320, the provisions below are identified as appropriate and applicable to the exercise of this authority, and all regulations not identified herein are deemed inappropriate and inapplicable: Section 545.32(b)(3) and (b)(4), § 545.33(a) and (c) and § 563.99.

The banks rely on this section as additional evidence that the OTS intended to preempt Texas homestead law with respect to federal saving associations, as well as evidence of preemptive intent with respect to state-chartered institutions. Interestingly, the inter-agency letter from the FHLBB to HUD quoted above takes no position on the question of whether federal law has preempted state laws prohibiting state-chartered mortgage lenders from engaging in AMT lending. *See* FHLBB Letter, *supra*, at 61,709 ("The Board believes that state-chartered institutions should consult with the appropriate state regulator about whether such lenders may make certain loans pursuant to [the Parity Act], notwithstanding contrary state law.").

We may note at this juncture that the FHLBB Letter prompted a member of the Texas legislature to request an opinion from the Texas Attorney General on the correctness of the FHLBB Letter. The Attorney General advised that he was not convinced that the FHLBB was correct in opining that Texas homestead law had been preempted with respect to the power of federal savings associations to engage in home equity lending, but that judicial resolution would have to be awaited for a conclusive answer. Op.Tex. Att'y Gen. No. JM-1269 (1990). The Attorney General did opine that

the Parity Act did not authorize state-chartered financial institutions to make and enforce home equity loans despite Texas homestead law. *Id.*

The OTS considered proposing a rule that would amend its regulations and clarify its intention to preempt state law with respect to the ability of federal savings associations "to engage in alternative mortgage transactions, including home equity conversion lending." 58 Fed.Reg. 56,941, 56,941 (1993). Amicus OTS has now informed us, however, that its consideration of the matter is complete and that it has decided to make no further changes in the agency's regulations.

4. *Application of Preemption Doctrine: Federal Savings Associations*

a. Intent to Preempt

We first inquire whether the materials cited by the banks demonstrate the clear and manifest purpose of the FHLBB/OTS to preempt Texas homestead law with respect to the operations of federal savings associations. Because the current regulations governing federal savings associations are unfortunately vague on the topic of preemption, we find it useful to consider the chronological development of the regulations at issue, those concerning RAMs and line of credit conversion mortgages.

We think it clear that, had this action been brought under the regulatory scheme in place in 1982, Texas' homestead laws would be preempted by the clear intent of the FHLBB in promulgating its regulations regarding RAMs. Texas' homestead laws prohibit private lenders from taking enforceable security interests in real estate coming within the legal definition of "homestead" with two exceptions (for purchase money or home improvements).

These restrictions therefore constitute limits on federal savings associations' "ability or right to make, purchase, or participate" in RAMS, which involve security interests taken in simple accumulated equity. *See* 12 C.F.R. § 545.6-4(c)(1) (1982) (describing RAMs as providing "periodic payments to homeowners based on accumulated equity"). A December 1988 report prepared by the House Research Organization to the Texas legislature estimated that Texas' homestead exemption removed from $150 to $260 million in home equity from the lending market, illustrating the substantial limitation on the ability of federal savings associations to make RAMs in Texas. *See* TEXAS HOUSE RESEARCH ORGANIZATION, NO. 147, SPECIAL LEGISLATIVE REPORT: SECOND MORTGAGES AND THE TEXAS HOMESTEAD EXEMPTION 30 (Dec. 21, 1988).

Under *de la Cuesta*, we focus our preemption inquiry on the manifestation *vel non* of agency intent to preempt state laws that might limit the ability of federal savings associations to make or participate in, for instance, the reverse annuity mortgages described in 12 C.F.R. § 545.6-4(c) (1982). Any ambiguity regarding agency intent arising from the text of the regulations themselves may be dispelled by reasonable agency constructions of the regulations. *See de la Cuesta*, 458 U.S. at 158 & n. 13, 102 S.Ct. at 3025 & n. 13. The regulations existing prior to 1983 clearly meet this test. State laws that "directly or indirectly" restricted the ability of federal savings associations to engage in graduated payment or reverse annuity mortgages were explicitly preempted by 12 C.F.R. § 545.6-4(a)(2) (1982). Texas' homestead laws indirectly prohibit RAM lending on property classified as homestead property because RAM lending depends entirely on the enforceability of liens taken

in the owner's equity. Such laws were therefore in conflict with the FHLBB regulations existing in 1982. They also directly conflicted with the earlier expressed agency purpose in promulgating its regulations authorizing AMT lending—to "meet the needs of homeowners during different phases of their financial life cycles." 43 Fed.Reg. 59,336, 59,336 (1978)

Having reviewed the state of the law prior to 1983, we must now answer the question of whether the current OTS regulations, which have gone unchanged in many respects since the 1983 revision of the real estate lending regulations, manifest a contrary, non-preemptive intent.

We conclude that the FHLBB did not manifest an intent to end its preemption of inconsistent state laws, such as Texas' homestead laws, in its 1983 revision of its real estate lending regulations. In particular, we note that the commentary preceding the publication of the final rules explicitly stated that the revision "d[id] not mean that any authority c[ould] no longer be exercised." 48 Fed.Reg. 23,032, 23,032 (1983). We further note that the preamble to the final regulations also explicitly states that "loan contract[s] may provide for negative amortization of a portion of the interest, or of all interest on a loan *such as a reverse annuity mortgage*. The substance of these provisions is unchanged from the Board's prior regulations." *Id.* at 23,037-38 (emphasis added). Thus, the ability of federal savings associations to engage in RAM lending, previously granted by 12 C.F.R. §§ 545.6-4 (1982), seems not to have been diminished by the elimination of that section in 1983.

Turning to the language of the current regulations, we find that those regulations, in keeping with the general philosophy of the FHLBB/OTS, contain only a general grant

of authority to federal savings associations to "originate, invest in, sell, purchase, service, participate, or otherwise deal in ... loans made on the security of residential or non-residential real estate ... subject to the limitations of this part." 12 C.F.R. § 545.32 (1993). The regulations contain few direct references to RAMs or line of credit conversion mortgages. However, 12 C.F.R. § 545.32(b)(4) (1993) provides that, with certain limitations, "a real estate loan may be fully amortized, partially amortized, non-amortized, *or a line-of-credit loan*, and the loan contract may provide for the deferral and capitalization of a portion of the interest" (emphasis added). The regulation governing home loans authorizes federal associations to use loan contracts that "provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower-occupied property and *on which periodic advances are being made*." 12 C.F.R. § 545.33(a) (1993) (emphasis added). The regulation implementing the Parity Act authorizes housing creditors that are not commercial banks, credit unions, or federal savings associations to "make alternative mortgage transactions (as defined by [12 U.S.C. § 3802] and as further defined and described by applicable regulations identified herein) *notwithstanding any state constitution, law or regulation*," 12 C.F.R. § 545.33(f) (1993) (emphasis added), thus suggesting broad authority to make such transactions on the part of federal associations as well. All these references support the inference that the OTS has continued the FHLBB's policy of permitting federal savings associations to engage in RAM lending (including line of credit conversion mortgage lending) without interference from state laws such as Texas homestead law.

The fly in the ointment is 12 C.F.R. § 545.32(c) (1993), which provides a definition for use in determining whether a loan "is made on the security of real estate." One element of the definition of such a loan is that the "security interest ... may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property in located." 12 C.F.R. § 545.32(c)(2) (1993). The district court relied exclusively on this provision in determining that the OTS regulations do not preempt Texas homestead law, and in fact incorporate that law as federal law. *First Gibraltar Bank*, 815 F.Supp. at 1014.

The history of this definitional section, however, indicates an agency purpose contrary to the district court's conclusion. The preamble to the 1983 revision of the regulations reveals that § 545.32(c) was adopted to deal with the problem of classifying property interests in time share units. Before the 1983 revision, loans on time share units were authorized only as consumer loans. 46 Fed.Reg. 23,032, 23,036 (1983). The FHLBB promulgated § 545.32(c) "in order to make clear what is required for a loan to be secured by real estate." *Id.* Under this revised regulation, then, "an association may make a real estate loan on the security of a time-share unit if the security property is real estate under state law. *Id.* Thus, the purpose of this section seems to have been to *broaden* rather than to constrict the range of transactions that federal associations could engage in under the real estate lending regulations. The state of Texas has not referred us to any authority beyond the words of § 545.32(c)(2) themselves for the proposition that that section was intended to cut back on federal associations' ability to engage in RAM or line of credit conversion mortgage lending, and we find none.

Additionally, we take note of the *de la Cuesta* Court's statement that

> the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution."

*de la Cuesta*, 458 U.S. at 157, 102 S.Ct. at 3024 (citations omitted). The Court was considering language in the FHLBB's regulations to the effect that rights and duties created by a due-on-sale clause in a mortgage contract used by a federal savings association "shall be fixed and governed by that contract." *Id.* The appellees in *de la Cuesta* argued that this regulation demonstrated intent to incorporate state contract law rather than preempt it. The Court rejected this argument, explaining that incorporation of state contract law for the purpose of contract interpretation did not foreclose preemption of state law for other purposes, e.g., the enforceability of due-on-sale clauses. *Id.* Likewise, in our case, we may recognize that 12 C.F.R. § 545.32(c)(2) incorporates state law generally concerning the creation of an enforceable security interest in real property, and, at the same time, conclude that other provisions of the OTS's regulations have preempted one aspect of state law affecting the enforceability of a security interest in real property—the homestead law—in part.

Although specific references to these particular AMTs in the pertinent regulations are few, they lend support to the argument that § 545.32(c)(2) was not adopted with the intent of limiting the lending authority possessed by federal savings associations. In particular, we refer to § 545.32(b)(4), which

authorizes federal savings associations to deal in line of credit loans, subject to the limitations of §§ 545.33 and 545.35. Had the OTS intended § 545.32(c)(2) to act as an incorporation of state law restricting the ability of federal savings associations to engage in line of credit conversion mortgage lending, presumably that section would also have been mentioned as a limiting section in § 545.32(b)(4).

Even assuming for the sake of argument that 12 C.F.R. § 545.32(c)(2) creates some ambiguity as to the authority of federal savings associations to engage in RAMs and line of credit conversion mortgages, we must give substantial deference to agency interpretations of these regulations that resolve the ambiguity. *de la Cuesta*, 458 U.S. at 158 & n. 13, 102 S.Ct. at 3025 & n. 13. The general rule is that agency interpretations of their own regulations are entitled to special defence if they are not plainly erroneous. *Udall*, 380 U.S. at 16-17, 85 S.Ct. at 801; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945). We have held that a published advisory letter from the general counsel of the FHLBB is entitled to deference as the interpretation of the agency. *See Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir.1988)("To the extent that § 1730g(a) is ambiguous, this FHLBB interpretation is entitled to deference provided it is reasonable."); *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339, 38 L.Ed.2d 287 (1973)(referring to a letter from general counsel for the EEOC as the interpretation of the commission). In the context of statutory interpretation by an agency, however, the Supreme Court has indicated that numerous factors can influence the general principle, such as (1) whether the agency has maintained its position

consistently, even if infrequently, (2) whether the agency interpretation is of long standing, (3) whether the public has relied upon the interpretation, (4) whether the interpretation involves a matter of public controversy, (5) whether the interpretation is based upon agency expertise in a complex area, (6) whether the agency itself has rulemaking authority, (7) whether Congress has known of and failed to repudiate the agency interpretation, (8) whether the agency has expressly addressed the application of the statute to the proposed issue, (9) whether the agency interpretation was rendered contemporaneously with the passage of the statute, and (10) the thoroughness, validity, and consistency of the agency's reasoning. *See Weber v. Heaney*, 793 F.Supp. 1438, 1455 (D.Minn.1992) (collecting cases), *aff'd*, 995 F.2d 872 (8th Cir.1993); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U.PA.L.REV. 549, 562 n. 95 (1985).

Continuing to assume *arguendo* that the relevant regulations are ambiguous, we agree with the banks that the FHLBB Letter is entitled to deference as the interpretation of the agency under *Gavey Properties* if it is reasonable. *See Gavey Properties*, 845 F.2d at 521. *But see Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir.1991) (holding that no deference is due an agency when it interprets statutes or regulations to preempt state law because preemption "involves matters of law—an area more within the expertise of the courts than within the expertise of [an administrative agency]"). The construction of these regulations expressed in the FHLBB Letter is, in our opinion, reasonable. Several factors support this conclusion, first among them being the consistency of this interpretation with the history of the regulation of RAMs

and the absence of any conflicting agency interpretations during the lifetime of these regulations. We also recognize the expressed opinion of the FHLBB in its preamble to the 1983 amendments to the regulations that no diminution of the lending authority of federal savings associations was intended by the amendments. The FHLBB Letter is supported by several portions of the OTS regulations that appear to assume that federal associations will be able to enter into and enforce RAMs and line of credit conversion mortgages. Section 545.32(b)(4) adverts to the power of savings associations to make real estate loans that are "line-of-credit" loans, subject to the limitations contained in §§ 545.33 (governing home loans) and 545.35 (governing other real estate loans). Notably absent is any reference to state law or § 545.32(c)(2). The regulation implementing the Parity Act, § 545.33(f), authorizes state lending institutions to use AMTs as defined and described by §§ 545.32(b)(3) and (b)(4), §§ 545.33(a) and (c), and § 563.99 "notwithstanding any state constitution, law or regulation." Section 545.32(c) is not referred to in this section as a limiting provision.

The FHLBB Letter, of course, is not without flaws. It admittedly fails to mention or incorporate 12 C.F.R. § 545.32(c) into its analysis. *See Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23 (1981) ("[T]he thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling."). Whether we would have reached the same conclusion as the FHLBB, however, is not the question. To uphold its determination, we need not find that its interpretation is the only

reasonable one, or even that it is the result we would have reached had we interpreted the regulations in the first instance. We need conclude only that it is a reasonable interpretation of the relevant provisions. *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389, 104 S.Ct. 2472, 2479, 81 L.Ed.2d 301 (1984). That conclusion is warranted on this record.

We therefore defer to the opinion expressed in the FHLBB Letter. "Federal associations are authorized to offer, and if the need arises, to foreclose upon line of credit conversion mortgages which are secured by Texas homesteads, despite contrary state law." FHLBB Letter, *supra*, at 61,708. Likewise, "the authority of Federal associations to make reverse mortgages is governed solely by the HOLA and 12 C.F.R. § 545.1, and ... 12 C.F.R. § 545.2 establishes that the [OTS] did not cede its authority over such transactions by Federal associations to the states." *Id.* at 61,707 n. 9.

We reject the argument by the state of Texas that our holding condones "preemption by stealth." As we have seen, the FHLBB made its preemptive intent clear in promulgating the first AMT (including RAM) regulations in 1978; any slight ambiguity was resolved by the adoption of the express preemption provision in 12 C.F.R. § 545.6-4(a)(2) (1982). Any objection to the agency's decision could and should have been made during the notice-and-comment periods preceding the adoption of these sets of regulations. Additionally, the regulations have been amended several times since 1982, and parties opposed to the preemption of Texas homestead law could have made their voices heard at each stage of the regulations' evolution. The agencies responsible for regulating federal savings associations,

however, have never manifested an intent to retreat from the clear preemption of Texas homestead law accomplished in the late 1970s and early 1980s.

The state argues that we may not find agency preemption in this case because Congress has expressly recognized the continued viability of Texas' homestead laws in recent legislation. For instance, 12 U.S.C. § 1428 directs the Federal Housing Finance Board to examine the laws of the various states from time to time relating to the operation of federal home loan banks, including "homestead and other rights." Additionally, some relatively recent amendments to the Internal Revenue Code now provide that

> [i]ndebtedness shall not fail to be treated as secured by any property solely because, under any applicable State or local homestead or other debtor protection law in effect on August 16, 1986, the security interest is ineffective or the enforceability of the security interest is restricted.

I.R.C. § 163(h)(4)(C). This provision's legislative history reveals that its purpose is to protect the deductibility of interest payments made

> on a loan secured by a recorded deed of trust, mortgage, or other security interest in a taxpayer's principal or second residence, in a State *such as Texas* where such security instrument will be rendered ineffective or the enforceability of such instrument will be otherwise restricted by State and local homestead or other debtor protection law *such as the Texas homestead law*[.]

S.REP.NO. 100-445, 100th Cong., 2d Sess. 37, *reprinted in* 1988 U.S.C.C.A.N. 4515, 4561 (emphases added).

Congress has assumed the continued vitality of Texas homestead law for the purposes of certain recent legislation—and with good reason. As we stated at the outset, the preemption sought in this case involves the applicability of Texas homestead law to only two specific types of mortgage transactions; its applicability in other contexts, such as standard fixed-term, fixed-rate mortgages not for purchase money or property improvements, remains unquestioned. We do not believe that Congress has acted in any of the legislation cited by the state of Texas with the purpose of revising or repudiating the limited preemption undertaken by the FHLBB and the OTS. The fact that Congress has incorporated into legislation special provisions to take the peculiarities of Texas homestead law into account does not necessarily demonstrate that the FHLBB/OTS's decision to preempt that law "is not one that Congress would have sanctioned." *de la Cuesta,* 458 U.S. at 154, 102 S.Ct. at 3023 (quoting *United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961). It is hardly surprising that Congress was unaware of the limited preemption undertaken by the FHLBB and the OTS in the absence of any judicial pronouncements to that effect; we note that the clarifying interpretation rendered by the deputy general counsel for the FHLBB was not rendered until 1989, after Congress passed the section for the Internal Revenue Code cited above.

Congress, it may also be noted, has apparently not acted to repudiate the interpretation espoused in the FHLBB Letter since its publication. *Cf. Zemel v. Rusk,* 381 U.S. 1, 11, 85 S.Ct. 1271, 1278, 14 L.Ed.2d 179 (1965) ("Under some circumstances, Congress' failure to repeal or revise [an] administrative interpretation [of a statute] has been

held to constitute persuasive evidence that that interpretation is the one intended by Congress."). Not only has Congress declined to expressly repudiate the OTS's preemption of Texas homestead law, but Congress also expressly recognized in the Parity Act that the FHLBB had "adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing." 12 U.S.C. § 3801(a)(3). As we have noted, at the time the Parity Act was passed FHLBB regulations included express authorization for federal associations to engage in RAM lending.

Although the persuasive force of the FHLBB Letter is not enhanced by the agency's failure to consider these acts of Congress suggesting the continued vitality of Texas homestead law in its interpretive analysis, we do not agree with the state's argument that Congress' actions cited above forbid the agency's interpretation in favor of preemption. Assuming that the pertinent regulations are in fact ambiguous on the subject of preemption of Texas homestead law, we conclude that the interpretation of the agency as expressed in the FHLBB Letter is a reasonable one. The OTS has preempted Texas homestead law insofar as Texas law prohibits federal savings associations from taking enforceable security interests in homestead property through RAMs and line of credit conversion mortgages.

b. Authority to Preempt

The second prong of our analysis under *de la Cuesta* requires us to ask whether the OTS's attempted preemption of Texas homestead law "is within the scope of the [agency's] delegated authority." *de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 3023. Express congressional authorization to displace state law is not required. *City of New York,*

486 U.S. at 64, 108 S.Ct. at 1642; *de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 3023. "[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Pub. Serv. Comm'n.*, 476 U.S. at 374, 106 S.Ct. at 1901. The Supreme Court has already told us that, in enacting the HOLA, "Congress delegated to the [FHLBB] ample authority to regulate the lending practices of federal savings and loans so as to further the Act's purposes." *de la Cuesta*, 458 U.S. at 159, 102 S.Ct. at 3025. Congress intended for the FHLBB to create and regulate "federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Id.* at 168, 102 S.Ct. at 3030.

The *de la Cuesta* Court rejected several arguments that Congress had not delegated to the FHLBB the power to preempt state law with a uniform federal law governing the enforceability of due-on-sale clauses. The appellees argued that certain parts of the HOLA explicitly preempted various aspects of state law and that the FHLBB's authority to preempt was limited to those enumerated areas; the Court refused to read Congress' broad delegation of power to the FHLBB in 12 U.S.C. § 1464(a) as confined to areas of state law specifically described by the Act's other provisions. *de la Cuesta*, 458 U.S. at 162, 102 S.Ct. at 3027. The Court also relied on the HOLA's legislative history as supporting a broad delegation of plenary power to the FHLBB to regulate the operations of federal savings and loans. *Id.* at 163-64, 102 S.Ct. at 3027. Finally, the Court noted that the mortgage lending practices of a savings association are a

critical aspect of its "operation," over which the FHLBB unquestionably had jurisdiction. *Id.* at 167, 102 S.Ct. at 3029. The FHLBB's due-on-sale regulation was promulgated with the purpose of protecting the financial soundness of federal savings associations and thus enhancing the availability of credit for home construction and purchase. *Id.* at 168, 102 S.Ct. at 3030. The Court refused to pass on the advisability of the regulation allowing enforcement of due-on-sale clauses as a matter of economic policy except to hold that the regulation was not arbitrary or capricious. *Id.* at 169-70, 102 S.Ct. at 3030-31. The Court explicitly rejected the appellees' contention that the FHLBB's power to regulate federal savings associations "extends only to the associations' internal management and not to any external matters, such as their relationship with borrowers." *Id.* at 170 n. 23, 102 S.Ct. at 3031 n. 23.

The state of Texas focuses on part of the *de la Cuesta* Court's rationale for finding congressional delegation of the power claimed by the FHLBB to distinguish that case from the one at bar. The Court noted that the FHLBB's "due-on-sale policy is based on the view that due-on-sale clauses are essential to the financial soundness of federal savings and loans; preservation of the associations' very existence is obviously related to their internal management and is one of the functions delegated to the Board by Congress." *Id.* The state of Texas argues that the ability to make loans secured by equity in homestead property is not integral to the management of a federal savings association, nor is it essential to preserve the very existence of such associations. Plainly such associations have existed in Texas for many years despite the rigors imposed on them by Texas homestead law.

The state also relies on our opinion in *Gulf Fed. Sav. and Loan Ass'n v. Federal Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir. Nov. 1981), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982), for the proposition that the FHLBB/OTS lacks the power to preempt state law except with respect to the internal management of federal savings associations. Gulf Federal, a federal savings and loan, used from its inception a method of calculating interest due on its loans known as the 365/360 method. *Id.* at 261. Four years after Gulf Federal was chartered, however, its board of directors adopted a motion to change the savings and loan's interest calculation policy to the 365/365 method, which is slightly more favorable to borrowers. *Id.* Although the 365/365 method was incorporated into Gulf Federal loan agreement forms, the agreements also stated the precise amounts of interest to be paid calculated under the 365/360 method, and the savings and loan in fact continued to charge interest based on the 365/360 method. *Id.* at 261-62. Despite the fact that no borrowers complained of the discrepancy, the FHLBB investigated the situation and issued a cease-and-desist order against Gulf Federal ordering it to calculate interest under the 365/365 method described in its loan agreements and to reimburse borrowers for any overpayments that resulted from application of the 365/360 method. *Id.* at 262. Gulf Federal appealed from the cease-and-desist order. *Id.*

We first reversed the FHLBB's finding that Gulf Federal's practice of charging interest according to the 365/360 method regardless of contrary terms in the loan agreements constituted an "unsafe or unsound" practice within the meaning of the statute granting the FHLBB cease and desist authority. *Id.* at 263; *see also id.* at 264 ("The

breadth of the 'unsafe or unsound practice' formula is restricted by its limitation to practices with a reasonably direct effect on an association's financial soundness.") We also rejected the FHLBB's contention that it was entitled to issue the cease-and-desist order because Gulf Federal was violating a law, holding that Gulf Federal had not breached the loan agreements under either federal common law or Louisiana law. *Id.* at 266-67. The state of Texas now relies on our discussion of the federal common law argument, in which the FHLBB contended that Congress had preempted state law generally in matters relating to federal savings associations. *Id.* at 266. We rejected this argument, concluding that the cases relied upon by the FHLBB stood only for the proposition that "federal law governs the *internal management* of federal savings and loan institutions." *Id.* We observed that Gulf Federal's conduct vis-a-vis its borrowers had nothing to do with the internal management of the association and that its loan contracts did not implicate the sound management of the association or the insurance liability of the government, nor did those contracts require a uniform federal rule to assure the sound management of such associations. *Id.*

The banks respond that our *Gulf Federal* decision was criticized by the Supreme Court in *de la Cuesta:*

> We therefore reject appellees' contention that the Board's power to regulate federal savings and loans extends only to the associations' internal management and not to any external matters, such as their relationship with borrowers. Although one federal ... court[ ] ha[s] drawn this distinction, [citing *Gulf Federal*], we find no support in the language of

> the HOLA or its legislative history for such restriction on the Board's authority.

*de la Cuesta*, 458 U.S. at 170 n. 23, 102 S.Ct. at 3031 n. 23. It seems plain, then, that the *de la Cuesta* Court recognized that the FHLBB possessed the power to preempt state laws affecting the relationship between federal associations and their borrowers; indeed, the Court held that the FHLBB could adopt a uniform federal rule to regulate the effect of due-on-sale clauses agreed to by the parties. *Gulf Federal* is thus not good authority for the proposition that the power delegated by Congress to the FHLBB was limited solely to the internal management of federal savings associations in light of *de la Cuesta*.

We believe that the argument put forward by the state of Texas—essentially that the authorization of the OTS to preempt state law is limited to measures directly related to maintaining the financial soundness of federal associations—is an overly narrow interpretation of Congress' intent in enacting the HOLA and creating the FHLBB. Clearly part of Congress' purpose was to protect the integrity of federal associations through agency supervision. This purpose, however, was only a means to an end. An overarching purpose of the HOLA, which was enacted during the Great Depression, was to provide the country with sources of housing financing at a time when "more than half the counties in the country, containing almost one-fifth of the total population were without home-financing institutions." *Id.* 458 U.S. at 159-60, 102 S.Ct. at 3026. That purpose has been capsulized and expanded in 12 U.S.C. § 1464(a), which authorizes the OTS to regulate the organization and operation of federal savings associations "[i]n order to provide thrift institutions for the

deposit of funds and for the extension of credit for homes *and other goods and services*" (emphasis added). The decision of the FHLBB/OTS to preempt Texas homestead law in the case of RAMs and line of credit conversion mortgages, thereby greatly expanding the pool of collateral available to Texans for borrowing purposes, is entirely consistent with the HOLA's purpose of ensuring the broadest availability of credit for general consumer purposes.

Broad authority to preempt Texas' homestead law is also consistent with one of Congress' express findings leading to the enactment of the Parity Act: "The Congress hereby finds that ... alternative mortgage transactions are essential to the provision of an adequate supply of credit secured by residential property necessary to meet the demand expected during the 1980's[.]" 12 U.S.C. § 3801(a)(2). Although the Parity Act's definition of AMTs, found at 12 U.S.C. § 3802(1), did not expressly describe mortgages secured by accumulated home equity, Congress later authorized HUD to insure a number of home equity conversion mortgages in a demonstration program for elderly homeowners and explicitly cited the Parity Act as a source of statutory authority for housing creditors to make such loans. 12 U.S.C. § 1715z-20; *see id.* § 1715z-20(b)(3) ("The term 'home equity conversion mortgage' means a first mortgage which provides for future payments to the homeowner based on accumulated equity and which a housing creditor ... is authorized to make ... in accordance with section 3803 of this title, notwithstanding any State constitution, law or regulation...."). These statutes provide additional support for the position that Congress intended to empower the FHLBB/OTS to preempt state laws that

interfere with the ability of federal savings associations to engage in RAM or line of credit conversion mortgage lending.

The banks also point out that this circuit has accorded deference to an agency's determination of its own statutory authority. *See NCNB Tex. Nat'l Bank v. Cowden*, 895 F.2d 1488, 1494 (5th Cir.1990) ("As the cases dealing with the pre-emptive effect of agency actions suggest, substantial deference to an agency's determination of its authority may be appropriate."); *Western Coal Traffic League v. United States*, 719 F.2d 772, 777 (5th Cir.1983) ("We begin, as we must, with a recognition of the limited role this Court plays in reviewing an administrative agency's construction of its statutory authority...."), *cert. denied*, 466 U.S. 953, 104 S.Ct. 2160, 80 L.Ed.2d 545 (1984). By asserting the position that its regulations have preempted Texas homestead law, both in the FHLBB Letter and in the OTS amicus brief filed in the instant cause, the agency has implicitly interpreted its governing statutes to authorize such preemption. This interpretation is not unreasonable in light of the broad mandate given the OTS by Congress in its governing statutes. *See, e.g.*, 12 U.S.C. § 1464(a) (authorizing the Director of the OTS to issue regulations providing for the organization and operation of federal savings associations "giving primary consideration of the best practices of thrift institutions in the United States").

We therefore conclude that the OTS did not exceed its authority in preempting Texas homestead law insofar as that law prohibits federal savings associations from engaging in RAMs and line of credit conversion mortgages and thereby taking enforceable security interests in real estate that qualifies as homestead property under Texas law.

### 5. *Application of Preemption Doctrine: Nonfederally Chartered Savings Associations*

We next turn to the issue relevant to plaintiff Beneficial, which is whether the federal statutes and regulations at issue preempt Texas homestead law so as to allow nonfederally chartered savings associations to engage in RAM and line of credit conversion mortgage lending. As we have observed, the Parity Act was enacted with the express purpose of putting nonfederally chartered housing lenders on a level playing field with federal savings associations "by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies." 12 U.S.C. § 3801(b). The Director of the OTS has authorized nonfederally chartered housing creditors (excluding banks and credit unions, which fall outside the regulatory purview of the OTS) to use loan contracts containing flexible amortization arrangements (including line-of-credit loans) under 12 C.F.R. § 545.32(b)(4) and loan contracts "provid[ing] for the deferral and capitalization of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made" under 12 C.F.R. § 545.33(a). *See* 12 C.F.R. § 545.33(f) (1993) (designating these and certain other regulations as "appropriate and applicable" to the exercise of AMT lending authority by state housing creditors).

Reviewing the history of these regulations, we find that, after passage of the Parity Act, the FHLBB published a notice to housing creditors regarding AMTs in the Federal Register. 47 Fed.Reg. 51,732 (1982). The notice states that

"[h]ousing creditors that are not commercial banks, credit unions or federal associations are authorized to make alternative mortgage loans secured by residential real estate [with certain limitations.]" *Id.* at 51,733. The notice cites 47 Fed.Reg. 36,612 (1982) for a "full description of the types of mortgage transactions authorized." *Id.* Turning to that publication, we find that, "[s]ince 1979, when the Board permitted the issuance nation-wide of variable-payment loans, each alternative mortgage instrument involving payment adjustment has been authorized.... The loan types so authorized [include] the reverse-annuity mortgage (RAM)...." 47 Fed.Reg. 36,612, 36,612 (1982). Ultimately, the notice appeared as an appendix to 12 C.F.R. § 545 (1984), which included a general grant of authority to state housing creditors to "make alternative mortgage transactions (as defined by [12 U.S.C. § 3802])." The administrative history of the regulations implementing the Parity Act thus demonstrate the intent of the FHLBB to put state housing creditors on a par with federal savings associations with respect to RAM lending.

The state of Texas argues that the regulations designated as applicable to state housing creditors in 12 C.F.R. § 545.33(f) authorize "only flexible interest rates, adjustments to interest rates, flexible amortization, and disclosure of the adjustable rates and terms." We concur; however, the concept of flexible amortization plainly includes the particular AMTs at issue in the instant case. *See* 12 C.F.R. § 545.32(b)(4) (1993) ("[A] real estate loan may be fully amortized, partially amortized, nonamortized, or a line-of-credit loan...."); *id.* § 545.33(a) (referring under the heading of "Amortization" to "loans to natural persons secured by borrower-occupied property and on which

periodic advances are being made"); *id.* § 545.33(c)(4) (referring to notice requirements required for line of credit loans). Thus, the state's narrow reading of the authority granted to state housing creditors by § 545.33(f) is not tenable. Neither do we find persuasive the state's argument that Congress intended for the Parity Act to preempt only state laws prohibiting adjustable interest rates. Congress broadly intended to create parity between state and federal housing creditors, and it enacted the Parity Act recognizing that federal savings associations had been given the authority to engage in AMT lending. 12 U.S.C. §§ 3801(b), (a)(3). As we have already noted, Congress also later authorized the Secretary of HUD to implement a demonstration program under which the Secretary would federally insure a number of home equity conversion mortgages for the elderly. 12 U.S.C. § 1715z-20. The program defined such a mortgage as one that "provides for future payments to the homeowner based on accumulated equity" and incorporated 12 U.S.C. § 3803 as a source of authority for housing creditors to make such loans "notwithstanding any State constitution, law, or regulation" to the contrary. 12 U.S.C. § 1715z-20(b)(3).

In light of Congress' purposes in enacting the Parity Act, and in light of the broad language of that Act and Congress' explicit recognition of the authority to issue home equity conversion mortgages in 12 U.S.C. § 1715z-20, we conclude that Congress empowered the OTS to authorize state housing creditors (as defined in 12 U.S.C. § 3803(a)(3)) to engage in RAM and line of credit conversion mortgage lending through the Parity Act. Thus, these housing creditors may engage in those types of transactions,

consistent with OTS regulations as specified in 12 C.F.R. § 545.33(f).

## IV. CONCLUSION

For the foregoing reasons we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

**FIRST GIBRALTAR BANK, FSB, and Beneficial Texas, Inc., Plaintiffs,**

**v.**

**Dan MORALES, as Attorney General for the State of Texas, and Albert Endsley, as Texas Consumer Credit Commissioner, Defendants.**

**No. A-92-CA-274 SS.**

**United States District Court, W.D. Texas, Austin Division.**

**Feb. 10, 1993.**

**ORDER**

SPARKS, District Judge.

BE IT REMEMBERED on the 26 day of August, 1992, came on to be heard and considered the parties' cross-motions for summary judgment. The parties were represented by counsel. Having considered the motions, all relevant pleadings and the argument of counsel, the Court believes Defendants' motion for summary judgment should be granted and Plaintiffs' motion for summary judgment should be denied.

I.

Plaintiff First Gibraltar Bank, FSB (First Gibraltar) is a federally chartered savings bank[1] that is regulated by the Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-1470. Plaintiff Beneficial Texas Inc. (Beneficial) is a nonfederally-chartered financial services corporation that

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[1] *See*, 12 U.S.C. § 1462(5).

is duly licensed in Texas.[2] They wish to make, purchase and enforce alternative mortgage transactions[3] secured by a lien on the borrower's homestead.[4] Article XVI, § 50[5] of

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[2] *See*, TEX.REV.CIV.STAT. art. 5069-3.01 et seq.

[3] An alternative mortgage transaction is "a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home (as that term is defined in section 5402(6) of Title 42)—

> (A) in which the interest rate or finance charge may be adjusted or renegotiated;
>
> (B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or
>
> (C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation."

12 U.S.C. § 3802(1). Alternative mortgage transactions include reverse mortgages and line of credit conversion mortgages. A reverse mortgage is basically the opposite of a mortgage. Instead of paying a mortgage company regularly scheduled payments in a specified amount, the mortgage company pays the borrower regularly scheduled payments in specified amounts. A line of credit conversion mortgage is a variant of a reverse mortgage. Instead of receiving regularly scheduled payments, the borrower has the option of receiving payments on demand in a desired amount.

[4] TEX.PROP.CODE § 41.002 provides:

> (a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of no more than one acre

the Texas Constitution and Tex.Prop.Code § 41.001[6],

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of land which may be in one or more lots, together with any improvements thereon.

(b) If used for the purposes of a rural home, the homestead shall consist of:

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

[5] TEX. CONST. art. XVI, § 50 states, in pertinent part:

The homestead of a family, or single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work an material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married.

[6] TEX.PROP.CODE § 41.001 provides, in pertinent part:

(a) A homestead ... [is] exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

however, voids liens created by such transactions on homestead property. Texas law prohibits a creditor from foreclosing on homestead property unless the debt is for purchase money for the homestead, taxes on the homestead, or work and materials used in constructing improvements to the homestead. Furthermore, the Texas Consumer Credit Commissioner has opined that such loans may violate the Texas Deceptive Trade Practices Act (DTPA), TEX.BUS. & COMM.CODE § 17.41 et seq. *See*, Texas Consumer Credit Commissioner, Interpretative Letter No. 86-6 (December 16, 1986). Plaintiffs fear that if they make, purchase or enforce alternative mortgage transactions, Defendants will enjoin their actions, prosecute them under Texas law and revoke their corporate charter or license.

Their fears arise because of the authority and the duties the Defendants in this case possess. Defendant Dan Morales is the Texas Attorney General. As the Attorney General, he has the authority and the duty to enforce the Texas Constitution and the laws of the State of Texas. This includes the authority and duty to suspend or revoke corporate charters, sue for injunctive relief, and bring an action on behalf of the State for civil penalties and/or injunctive relief under the DTPA. *See*, TEX.CONST.

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(b) Encumbrances may be properly fixed on homestead property for:

(1) purchase money;

(2) taxes on the property; or

(3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is preformed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married.

art. 4, § 22; TEX.GOV'T CODE § 402.021 et seq.; and TEX.BUS. & COMM.CODE § 17.41 et seq. Defendant Albert Endsley is the Texas Consumer Credit Commissioner. As such, he enforces the majority of the chapters of the Texas Consumer Credit Code (Credit Code) which means he regulates the vast majority of consumer loans and consumer credit transactions authorized under Texas law. *See*, TEX.REV.CIV.STAT. art. 5069-2.02A(1). He also has the authority to issue interpretations of the Credit Code. *See*, TEX.REV.CIV.STAT. art. 5069-2.02A(10). The Credit Code prohibits lenders, such as Beneficial, from making, purchasing and enforcing alternative mortgage transactions other than for purchase money, work and materials to construct improvements and/or real estate taxes, TEX.REV.CIV.STAT. art. 5069.3.20(2), and the Credit Commissioner may suspend or revoke a lender's license if the lender violates this provision. TEX.REV.CIV.STAT. art. 5069-3.07(1)(b).

Plaintiffs filed this suit for declaratory and injunctive relief. They contend that the Home Owners' Loan Act (HOLA), as amended, 12 U.S.C. §§ 1461-1470, the Alternative Mortgage Transaction Parity Act of 1982 (Parity Act), 12 U.S.C. §§ 3801-3806, and the regulations promulgated under them preempt Texas homestead law to the extent that Texas homestead law prohibits alternative mortgage transactions. Plaintiffs seek declaratory judgment that the HOLA and the Parity Act have preempted Texas homestead law to the extent that Texas homestead law

prohibits alternative mortgage transactions.[7] In addition, they seek an injunction enjoining Defendants from enforcing the alleged preempted portions of Texas homestead law and/or prosecuting Plaintiffs if they violate the alleged preempted portions.

Defendants disagree and assert that neither the HOLA regulations nor the Parity Act have preempted any portion of Texas homestead law. The Texas Attorney General stated this position in a 1990 Texas Attorney General Opinion. *See*, Op.Tex.Att'y Gen. No. JM-1269 (1990).

II.

Congress, acting within the authority granted it by the Supremacy Clause, U.S. Const., Art. VI, cl. 2[8], may enact legislation that preempts state law. Preemption may be either expressly stated in the statute or "implicitly

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[7] Plaintiffs are only seeking a limited preemption of Texas homestead law. They only contend that Texas homestead law has been preempted to the extent that it prohibits alternative mortgage transactions. They do not contend that HOLA or the Parity Act preempts "Texas Homestead Law in other contexts such as traditional fixed-rate, fixed-term home loan transactions, federal bankruptcies in which debtors elect to use state law exemptions, and judgment creditor claims against individual debtors." *See, Complaint for Declaratory Judgment and Injunctive Relief, p. 16 (May 4, 1992).*

[8] Article VI, Clause 2 of the U.S. Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *See also, Cipollone v. Liggett Group, Inc.*, ——— U.S. ———, ———, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Either way, the ultimate question remains the same--Did Congress intend to preempt state law? *See Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369 (1986) ("The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law."); *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). A court always "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

The Supreme Court has made it clear that state law is preempted if Congress has completely displaced state law in a specific area or it "actually conflicts" with federal law. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987); *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022. State law "actually conflicts" with federal law if "there is outright conflict between federal and state law," *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. at 368, 106 S.Ct. at 1898," compliance with both federal and state regulations is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217,

10 L.Ed.2d 248 (1963), or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

The authority to preempt does not depend upon the classification of the state law allegedly preempted. As the Supreme Court has stated: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962). Thus, preemption principles apply despite the fact that Plaintiffs are seeking a ruling that Federal law has preempted Texas real property law. *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022 ("These principles are not inapplicable here simply because real property law is a matter of special concern to the States.").

Furthermore, Congress may delegate its preemptive authority to an administrative agency. *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022. Where Congress has done so and the agency acts within the scope of that authority, the agency may preempt and "render unenforceable state or local laws that are otherwise not inconsistent with federal law." *Louisiana Public Service Commission*, 476 U.S. at 369, 106 S.Ct. at 1898-1899; *See also, de la Cuesta*, 458 U.S. at 153-154, 102 S.Ct. at 3022-3023. Moreover, the authority of an agency to preempt state law "does not depend on an express congressional authorization to displace state law." *de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 3023. "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has

exceeded his statutory authority or acted arbitrarily." *de la Cuesta*, 458 U.S. at 153-154, 102 S.Ct. at 3022-3023. As the Supreme Court recently noted:

> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to preempt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned."

*City of New York v. Federal Communications Commission*, 486 U.S. 57, 64, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988). To determine whether an agency's action preempts state law, a court must determine whether (1) the agency intended to preempt state law, and, if so, (2) whether the agency exceeded its statutory authority or acted arbitrarily in preempting state law. *See, de la Cuesta*, 458 U.S. at 153-154, 102 S.Ct. at 3022-3023. Finally, "substantial deference to an agency's determination of its authority may be appropriate." *NCNB Texas National Bank v. Cowden*, 895 F.2d 1488, 1494 (5th Cir.1990).

III.

The HOLA was originally passed in 1933 as the "Home Owners' Loan Act of 1933". The "of 1933" was struck by amendments to the act in 1989. The act was a product of the Great Depression and was intended "to provide emergency relief with respect to home mortgage indebtedness" at a time when many homeowners were in

default on their mortgages. *See, de la Cuesta*, 458 U.S. at 159, 102 S.Ct. at 3025, *quoting*, H.R.Conf.Rep. No. 210, 73d Cong., 1st Sess., 1 (1933). At the time, almost one-fifth of the country's population did not have access to a home-financing institution. *See, de la Cuesta*, 458 U.S. at 159-160, 102 S.Ct. at 3025-3026, *citing* H.R.Conf.Rep. No. 210, 73d Cong., 1st Sess. 7, 19 (1933). To ease the situation, Congress enacted the "HOLA of 1933." It provided for a uniform system of federal savings and loans regulated by a single board, the Federal Home Loan Bank Board (FHLBB or Board), so as to ensure the vitality of the federal savings and loans as "permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors." *de la Cuesta*, 458 U.S. at 160, 102 S.Ct. at 3026, *quoting*, S.Rep. No. 91, 73d Cong., 1st Sess., 2 (1933).

In § 5(a) of the Act, Congress gave the Board plenary authority to issue regulations governing federal savings and loans:

> In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide

> such institutions the flexibility necessary to maintain their role of providing credit for housing.

12 U.S.C. § 1464(a). "The broad language of § 5(a) expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans." *de la Cuesta*, 458 U.S. at 161, 102 S.Ct. at 3026. This "suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *de la Cuesta*, 458 U.S. at 162, 102 S.Ct. at 3027.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183 (FIRREA) amended HOLA. The 1989 amendments dissolved the Board and created the Office of Thrift Supervision (OTS) in its place. 12 U.S.C. § 1462a(a and b). It also created the position of Director to head the OTS and granted the Director all powers which were:

> (1) vested in the Federal Home Bank Board (in the Board's capacity as such) or the Chairman of such Board on the day before the date of the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989; and
>
> (2) were not
>
> > (A) transferred to the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, the Resolution Trust Corporation, or the Federal Home Loan Mortgage Corporation pursuant to any amendment made by such Act; or (b) established under any provision of law repealed by such Act.

12 U.S.C. § 1462a(e). The authority to preempt state law was not transferred to any of the mentioned organizations or

repealed by the FIRREA. FIRREA also granted the Director the authority to "prescribe such regulations and issue such orders as the Director may determine necessary for carrying out this chapter and all other laws within the Director's jurisdiction." 12 U.S.C. § 1462a(b)(2). Congress retained substantially the same language in § 5(a), giving the Director the same plenary power to issue regulations governing federal savings and loans that it had entrusted in the Board:

> In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Director is authorized, under such regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations (including Federal savings banks), and to issue charters therefor, giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit to housing safely and soundly.

12 U.S.C. § 1464(a). Therefore, if anything, the 1989 amendments expanded the power of the Director. Accordingly, the Court concludes that the Director has the authority to promulgate regulations that preempt state law.

Regulations

Plaintiffs contend that the regulations promulgated by the Director of the OTS and his predecessor the Board pursuant to their authority under the HOLA preempt Texas homestead law to the extent that it prohibits federal savings

associations, such as First Gibraltar, from making, purchasing and enforcing alternative mortgage transactions. However, a review of the statute and regulations reveals this is inaccurate.

The HOLA permits, "to the extent specified in regulations of the Director, a Federal savings association to invest in, sell or otherwise deal in ... loans on the security of liens upon residential real property." 12 U.S.C. § 1464(c)(1)(B).

The regulations authorize a Federal savings associations to "exercise all authority granted it by the Home Owners' Loan Act of 1993 ("Act"), 12 U.S.C. § 1464, as amended, and its charter and bylaws, whether or not implemented specifically by [OTS] regulations, subject to the limitations and interpretations contained in this part." 12 C.F.R. § 545.1 (1992).

Section 545.32(a) provides that a Federal savings association may originate, invest in, sell, purchase, service, participate or otherwise deal in loans made on the security of residential real estate or interests in such loans, subject to the limitations of the section. [9] "Residential real estate" includes homestead property in Texas. *See*, 12 C.F.R.

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[9] 12 C.F.R. § 545.32(a) provides:

> Pursuant to sections 5(c)(1)(B) and 5(c)(2)(B) [12 U.S.C. §§ 1464(c)(1)(B) and (c)(2)(B)], a Federal savings association may originate, invest in sell, purchase, service, participate, or otherwise deal in (including brokerage or warehousing) loans made on the security of residential or nonresidential real estate, or interests in such loans, subject to the limitations of this part.

§ 541.23[10]. The OTS promulgated section 545.32, as well as the other regulations in Part 545, pursuant to its plenary and exclusive authority to regulate all aspects of Federal savings associations, and the regulations preempt any state law purporting to address the operations of Federal savings association. *See*, 12 C.F.R. § 545.2 (1992). Plaintiffs argue, therefore, the regulations preempt Texas homestead law to the extent that it prohibits federal savings associations from making, purchasing and enforcing alternative mortgage transactions, because Texas homestead law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the regulations.

Plaintiffs' argument, however, ignores § 545.32(c)(2) which expressly provides that state law determines whether a loan on residential property is secured.[11] Texas law

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[10] 12 C.F.R. § 541.23 defines "residential real estate" as:

> homes (including condominiums and cooperatives), combinations of homes and business property, other real estate used for primarily residential purposes other than a home (but which may include homes), combinations of such real estate and business property involving only minor business use, farm residences and combinations of farm residences and commercial farm real estate, property to be improved by the construction of such structures, or leasehold interests in the above real estate.

[11] Section 545.32(c) states:

> (c) *Security property.* A loan is made on the security of real estate if:
>
> (2) The security interest of the Federal savings association may be enforced as a real estate mortgage

provides that homestead property—residential real estate—cannot secure a loan except for loans for purchase money for the homestead, for work and materials used to construct improvements on the homestead and/or for taxes on the homestead. Since the regulations specifically incorporate Texas law to determine whether a loan is secured in Texas, it is undeniable that the regulations promulgated pursuant to the Director's authority under the HOLA were not intended to and do not preempt Texas homestead law.

General Counsel's Advisory Letter

Additionally, Plaintiffs insist an advisory letter submitted by the General Counsel of the Board establishes the Director's intent to preempt Texas homestead law to the extent that it prohibits federal savings and loan associations from making, purchasing or enforcing alternative mortgage transactions. *See*, FHLBB General Counsel Opinion Letter (August 4, 1989). In 1989, the General Counsel of the Board issued an advisory letter in which he expressly states:

> The Texas laws [prohibiting lenders from foreclosing on homesteads that secure line of credit conversion mortgages (a type of alternative mortgage transaction)] clearly prevent Federal associations from exercising the authority granted to them by the HOLA and the Board's regulations. Therefore, this Office concludes that the constitution and statutes of Texas under review are "an obstacle to the accomplishment and execution of the purposes and objectives" of 12 C.F.R. pt. 545 to the extent that

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or its equivalent pursuant to the law of the state in which the property is located.

> they prevent Federal associations from securing line of credit conversion mortgages with real estate consisting of homesteads, and foreclosing on such mortgages in the event of default. According to *de la Cuesta*, the HOLA authorizes the Board to enact regulations that preempt substantive state real property laws purporting to govern the mortgage lending operations of Federal associations. The regulatory history of 12 C.F.R. § 545 reveals that the Board exercised this authority to preempt state real property laws, insofar as reverse mortgages are concerned.

FHLBB General Counsel Opinion Letter, pp. 8-9 (August 4, 1989) (footnote omitted). Plaintiffs, relying on *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and *Gavey Properties/762 v. First Financial Savings and Loan*, 845 F.2d 519 (5th Cir.1988), assert that the advisory letter is equivalent to a regulation promulgated by the Director and is entitled to deference unless it is unreasonable. While the general counsel's advisory letter is entitled to great deference, *See, Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339, 38 L.Ed2d 287 (1973) (a general counsel's advisory letter interpreting a statute is the agency's interpretation); *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782 (an administrator of an agency's interpretation of a statute is entitled to deference unless unreasonable); *Griggs v. Duke Power Company*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158 (1971) ("The administrative interpretation of [a statute] by the enforcing agency is entitled to great deference."); and *Gavey*, 845 F.2d at 521 (an agency and general counsel's interpretation of a statute

is entitled to deference unless unreasonable), the Court believes the interpretation is unreasonable given the unambiguous language of 12 C.F.R. § 545.32(c)(2) (1992).

IV.

Congress enacted the Parity Act as Title VIII of the Garn-St. Germain Depository Institution Act of 1982, Pub.L.No. 97-320, 96 Stat. 1545 (1982), as amended, 12 U.S.C. § 3801 et seq. The Parity Act was intended to end discrimination between federally and nonfederally chartered housing creditors by authorizing all housing creditors[12] to "make, purchase and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies." 12 U.S.C. § 3801(b). The Parity Act provides that housing creditors may make, purchase and enforce alternative mortgage transactions notwithstanding any state constitution, law or regulation, but they are subject to limitations set out in § 3803. 12 U.S.C. § 3803(c). The limitations divide housing creditors into three categories: banks, credit unions, and all other housing creditors. Plaintiffs are neither a bank nor a credit union. Consequently, by default, they fall into the "all other housing creditors" category.

Section 3803(a)(3) dictates that "all other housing creditors" must make, purchase and enforce alternative mortgage transactions "in accordance with regulations governing alternative mortgage transactions as issued by the

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[12] For the purposes of this case, a "housing creditor" is "any person who regularly makes loans, credit sales or advances secured by interests in [homes] or any transferee of any of them." 12 U.S.C. § 3802(2)(C and D).

Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section." Thus, there are two questions: (1) where, outside of 12 U.S.C. § 3803, has Congress granted the Director of the OTS rulemaking authority over alternative mortgage transactions?; and (2) what regulations has the Director of the OTS issued pursuant to that authority?

The answer to the first question is simple; Congress granted the Director of OTS rulemaking authority over alternative mortgage transactions in the HOLA. *See*, 12 U.S.C. § 1464; *de la Cuesta*, 458 U.S. at 162, 102 S.Ct. at 3027.

Answering the second question is a little more difficult. A federally chartered savings and loan association is a federal savings association. *See*, 12 U.S.C. § 1462(5) ("The term 'Federal savings association' means a Federal savings association or a Federal savings bank chartered under" 12 U.S.C. § 1464.); H.R.Rep.No. 54(I), 101st Congress, 1st Sess., § 301 (1989), *reprinted in*, 1989 U.S.C.C.A.N. 86, 136 ("The term "Federal association" includes all Federal savings and loan associations and Federal savings banks chartered pursuant to section 5 of the HOLA."). Federally chartered savings and loan associations are, therefore, subject to 12 C.F.R. § 545.33(c)(2) which expressly provides that state law determines whether a home loan is secured. As already stated many times, a lender cannot secure a loan with homestead property in Texas unless the loan is for purchase money for the homestead,

work and materials used to construct improvements to the homestead, or taxes on the homestead. Since the regulations promulgated by the Director of the OTS dictate that state law, in this case Texas homestead law, determines whether a loan is secure, it is clear that neither Congress nor the Director intended the Parity Act to preempt Texas homestead law. This is consistent with the Parity Act's stated purpose "to eliminate discrimination the regulations have upon non-federally chartered housing creditors and provide them with parity with federally chartered institutions." 12 U.S.C. § 3801(b).

V.

The Court is unwilling to hold that the Director of the Office of Thrift Supervision has promulgated regulations preempting Texas homestead law and altered the entire scheme of Texas substantive law relating to its citizens' property rights unless and until the Director's authority to preempt Texas homestead law and his exercise of that authority are convincingly and unquestionably clear. The regulations in this case simply do not satisfy this requirement.

The Court concludes that neither the Director of the Office of Thrift Supervision in promulgating regulations pursuant to his authority under the HOLA nor Congress in enacting the Parity Act intended to preempt Texas homestead law prohibiting federal savings associations from making, purchasing and enforcing alternative mortgage transactions. Consequently, Plaintiffs First Gibraltar and Beneficial remain subject to Texas homestead laws when making, purchasing and enforcing alternative transactions.

**IT IS ORDERED that Plaintiffs First Gibraltar Bank and Beneficial Texas' Motion for Summary Judgment is DENIED.**

**IT IS ORDERED that Defendants Dan Morales and Albert Endsley's Motion for Summary Judgment is GRANTED.**

TEXAS CONSTITUTION, ART. XVI,

**§ 50. Homestead; protection from forced sale; mortgages, trust deeds and liens**

**Sec. 50. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption.**

# TEXAS PROPERTY CODE
## TITLE 5. EXEMPT PROPERTY AND LIENS
### SUBTITLE A. PROPERTY EXEMPT FROM CREDITORS' CLAIMS
### CHAPTER 41. INTERESTS IN LAND
### SUBCHAPTER A. EXEMPTIONS IN LAND DEFINED

**§ 41.001. Interests in Land Exempt from Seizure**

(a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

(b) Encumbrances may be properly fixed on homestead property for:

(1) purchase money;

(2) taxes on the property; or

(3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married.

(c) The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of the sale.

**§ 41.002. Definition of Homestead**

(a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not

more than one acre of land which may be in one or more lots, together with any improvements thereon.

(b) If used for the purposes of a rural home, the homestead shall consist of:

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

(c) A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection.

(d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

## UNITED STATES CODE

12 U.S.C. § 1462. Definitions

For purposes of this chapter —

* * * * *

(5) Federal savings association

The term "Federal savings association" means a Federal savings association or a Federal savings bank chartered under section 1464 of this title.

**12 U.S.C. § 1464. Federal savings associations**

**(a) In general**

In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director is authorized, under such regulations as the Director may prescribe —

(1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and

(2) to issue charters therefor, giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit for housing safely and soundly.

* * * * *

**(c) Loans and investments**

To the extent specified in regulations of the Director, a Federal savings association may invest in, sell, or otherwise deal in the following loans and other investments:

**(1) Loans or investments without percentage of assets limitation**

Without limitation as a percentage of assets, the following are permitted:

* * * * *

**(B) Residential real property loans**

Loans on the security of liens upon residential real property.

**12 U.S.C. § 3802. Definitions**

As used in this chapter —

(1) the term "alternative mortgage transaction" means a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home (as that term is defined in section 5402(6) of title 42 —

(A) in which the interest rate or finance charge may be adjusted or renegotiated;

(B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or

(C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation;

described and defined by applicable regulation; and

**12 U.S.C. § 3803. Alternative mortgage authority**

**(a) General authority; compliance by banks, credit unions and all other housing creditors with applicable regulations**

In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing, and enforcing alternative mortgage transactions,

housing creditors may make, purchase, and enforce alternative mortgage transactions, except that this section shall apply —

* * * * *

(3) with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section.

* * * * *

**(c) Preemption of State constitutions, laws or regulations**

An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.

**12 U.S.C. § 3806. Adjustable rate mortgage caps**

* * * * *

**(d) Definitions**

For the purpose of this section —

* * * * *

(2) the term "adjustable rate mortgage loan" means any consumer loan secured by a lien on a one- to four-family dwelling unit, including a condominium unit, cooperative housing unit, or mobile home, where the loan is made

pursuant to an agreement under which the creditor may, from time to time, adjust the rate of interest.

## CODE OF FEDERAL REGULATIONS

### 12 C.F.R. § 545.2 Federal preemption.

The regulations in this part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.

### 12 C.F.R. § 545.32 Real estate loans.

* * * * *

(c) *Security property.* A loan is made on the security of real estate if:

(1) The security property is real estate pursuant to the law of the state in which the property is located;

(2) The security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located;

(3) The security property is capable of separate appraisal; and

(4) With regard to a security property that is a leasehold or other interest for a period of years, the term of the interest extends, or is subject to extension or renewal at

the option of the Federal savings association, for a term of at least five years following the maturity of the loan.

**12 C.F.R. § 545.33 Home loans.**

Any loan made on the security of homes (including a unit of a condominium or cooperative), combinations of homes and business property, farm residences, and combinations of farm residences and commercial farm real estate (home loans) shall be subject to the limitations of this section.

* * * * *

(f) *Notice of housing creditors regarding alternative mortgage transactions.* Pursuant to title VIII, Pub. L. 97-320, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions (as defined by section 803 of Pub. L. 97-320 and as further defined and described by applicable regulations identified herein) notwithstanding any state constitution, law or regulation. In accordance with section 807(b) of Pub. L. 97-320, the provisions listed below are identified as appropriate and applicable to the exercise of this authority, and all regulations not identified herein are deemed inappropriate and inapplicable: Section 545.32(b)(3) and (b)(4), §545.33(a) and (c), and §563.99. Housing creditors engaged in credit sales should read the term "loan" as "credit sale" wherever appropriate.

**12 C.F.R. § 545.6-4a Adjustable mortgage loan instruments.**

(a) Authorization.

* * * * *

(2) This regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in 5(a) of the Home Owners' Loan Act of 1933, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase, participate, or otherwise deal in adjustable mortgage loans, or to directly or indirectly restrict such ability or right.

Federal Home Loan Bank Board

1700 G Street, N.W.
Washington, D.C. 20552

Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

August 4, 1989

John A. Maxim, Jr.
Associate General Counsel
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

Dear Mr. Maxim:

This is in response to your inquiries requesting an opinion from the Office of the General Counsel ("OGC") as to whether the regulations of the Federal Home Loan Bank Board ("Board" or "Bank Board") permit Federal associations to offer line of credit home equity conversion mortgages ("line of credit conversion mortgages"). You believe that if Federal associations are permitted to offer such mortgages, then certain state-chartered lenders may also offer such mortgages pursuant to Title VIII of the Garn-St Germain Depository Institutions Act of 1982 ("Garn-St Germain Act"),[1] which permits certain lenders to offer alternative mortgage products as provided by the Board's regulations. In addition to the authority question,

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[1] Pub. L. No. 97-320, 96 Stat 1469, 1545 as codified at 12 U.S.C. § 3801 et. seq. (1982).

you also ask whether Texas law, which apparently would prohibit lenders from foreclosing on homesteads that secure these line of credit conversion mortgages, are preempted by Federal regulations.[2]

As I understand it, the Department of Housing and Urban Development ("HUD") is implementing a program, pursuant to the Housing and Community Development Act of 1987[3] to insure home equity conversion mortgages ("reverse mortgages") for elderly homeowners. A reverse mortgage enables a borrower to convert the equity in a residence into liquid assets. Most reverse mortgages are structured so that the borrower receives regularly scheduled payments in specified amounts. Line of credit conversion mortgages are a variant of reverse mortgages. In contrast to other reverse mortgages, borrowers under the line of credit conversion mortgage would not necessarily receive regular, scheduled payments. Instead, the mortgagors would have the option of receiving payments on demand in a desired amount. The mortgagors would be natural

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[2] Specifically, you asked if federal law specifically preempts those provisions of the constitution and statutes of the State of Texas which prohibit a creditor from foreclosing upon a homestead except when the debt is for: (1) the purchase price of the homestead; (2) unpaid taxes on the homestead; and (3) work and materials used in construction improvements on the homestead. See TEX. CONST. art. 16, § 50 and TEX. PROP. CODE ANN. §§ 41.001, 41.002 (Vernon 1985). According to your letter, Texas caselaw holds that a mortgagor can waive this homestead protection only by failing to raise it as a defense in legal proceedings. Your letter states that line of credit conversion mortgages are not covered by these three exceptions.

[3] Pub. L. No. 100-242, § 417, 101 Stat. 1815, 1908, as codified at 12 U.S.C. § 1715z-20 (Supp. V 1987).

persons, and the homes that secure the line of credit conversion mortgages would be owner occupied. The following addresses your inquiries.

I. DO LINE OF CREDIT CONVERSION MORTGAGES MEET THE REQUIREMENTS OF 12 C.F.R. §§ 545.32(b)(4) AND 545.33(c)?

According to HUD's interpretation of Section 255 of the Housing and Community Development Act of 1987, reverse mortgages qualify as alternative mortgages pursuant to the Garn-St Germain Act. Specifically, HUD believes that Title VIII of the Garn-St Germain Act authorizes certain mortgage lenders to offer these mortgages pursuant to Bank Board regulations. HUD has requested that the OGC analyze whether line of credit conversion mortgages comply with the requirements of 12 C.F.R. §§ 545.32(b)(4) and 545.33(c). We now proceed to address this issue.

The history of 12 C.F.R. pt. 545, which governs the operations of Federal associations, is crucial to this analysis. Prior to the Garn-St Germain Act, Federal associations were specifically authorized by 12 C.F.R. §§ 545.6-2(a)(7) and 545.6-4(d) (1981) to offer reverse mortgages to homeowners.

After the Garn-St Germain Act was enacted, the Board substantially revised 12 C.F.R. pt. 545. Explicit provisions governing reverse mortgages were removed from the regulation, and 12 C.F.R. § 545.1 (1988), which reads as follows, was added:

> A Federal association may exercise all authority granted it by the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, as amended . . . whether or not implemented specifically by Bank Board regulation, subject

> to the limitations and interpretations contained in this part.

The preamble, which discusses 12 C.F.R. § 545.1, states:

> Current Part 545 is based upon the premise that the investment authority of the HOLA must be implemented expressly by regulation . . . In order to grant associations the maximum flexibility to exercise the authorities granted by the HOLA, the Board has determined to revise the general approach to regulating investment activities of Federal associations. Accordingly, Part 545 now addresses the authority of associations only to limit, interpret or recognize incidental authority. Federal associations may exercise all authority granted by the HOLA subject only to limitations contained in the regulations. Because this approach differs from the current treatment, these amendments to Part 545 include a section specifically stating that Federal associations may exercise all statutory authority subject to the limitations in this Part. The Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised.

48 Fed. Reg. 23032, 23032 (May 23, 1983) (emphasis added).

It is clear from the above passages that 12 C.F.R. pt. 545 and the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1464, historically have provided Federal

associations with independent authority to enter into reverse mortgage transactions. The portion of the preamble that is underscored above indicates that 12 C.F.R. § 545.1 enables Federal associations to continue offering reverse mortgages to their borrowers. Additionally, the fact that the preamble specifically discusses the impact of the amended regulation on reverse mortgages in an unrelated context, bolsters our conclusion that Federal associations retain authority to engage in such transactions.[4]

The issue now become whether a line of credit conversion mortgage, as envisioned by HUD, is a reverse mortgage, within the ambit of 12 C.F.R. pt. 545. Title 12 C.F.R. § 545.1 states that Federal associations can exercise any power granted by the HOLA, subject only to the limitations of the regulation. According to 12 U.S.C. § 1464(c)(1)(B), Federal associations are authorized to make "loans on the security of liens upon residential . . . real property." Since line of credit conversion mortgages are, in fact, loans on the security of residential real estate, Federal

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[4] The preamble states:

> For example, [12 C.F.R. § 545.34] would require disclosure of provisions in a contract for a reverse annuity mortgage under which the outstanding loan principal may become due and payable as a result of the borrower's death, upon maturity of the loan, or upon a failure to maintain the security property.

See 48 Fed. Reg. 23032, 23040 (May 23, 1983).

associations may offer such mortgages to their borrowers, subject only to the restrictions of 12 C.F.R. pt. 545.

Your first letter specifically asked whether line of credit conversion mortgages pass scrutiny under 12 C.F.R. §§ 545.32(b)(4) and 545.33(c). Title 12 C.F.R. § 545.32(b)(4), pertains to the amortization of real estate loans, whereas 12 C.F.R. § 545.33(c) involves the amortization of home loans. Subject to the limitations of §§ 545.33 and 545.35, Federal associations are authorized by 12 C.F.R. § 545.32(b)(4) to make line of credit real estate loans, in which the "contract may provide or the deferral and capitalization of a portion of the interest." Similarly, 12 C.F.R. § 545.33(c) states that "the loan contract may provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made."

You specifically ask whether the advance feature of these mortgages complies with the requirement of "periodic advances" in section 545.33(c), since the borrower may elect to receive either regularly scheduled payments or payments on demand. As you are aware, the Board addressed a similar inquiry in interpreting 12 C.F.R. § 591.2(n) (1988), which defines the term "reverse mortgage" for purposes of the Board's due-on-sale regulations. This definition states that a "reverse mortgage" is "any instrument providing periodic payments to homeowners based on accumulated equity. . . ." 12 C.F.R. § 591.2(n) (1988). In a letter dated March 4,1988, we concluded that the Board intended a broad definition of "reverse mortgage" that would encompass reverse loans that provided the borrower with the option to receive periodic payments. See OGC Op. by Smith (March 4, 1988); 48 Fed. Reg. 2373, 2374 (1983).

Likewise, in the present context, the Board explained in the preamble to the final regulation adopting section 545.33(c) that "the loan contract may provide for negative amortization of a portion of the interest, or of all the interest on a loan such as a reverse annuity mortgage." 48 Fed.Reg. 23032, 23037 (1983). Consequently, we believe that in both instances the Board was attempting to describe reverse mortgages and not to proscribe the development of variations in their features. We thus conclude that a reverse mortgage that gives the borrower the option to either receive regular payments at fixed intervals or to receive payments from time to time on demand fits within the contours of section 545.33(c).[5]

This Office, therefore, concludes that line of credit conversion mortgages, as described in your September 26, 1988 letter, are permissible under both the HOLA and the applicable provisions of 12 C.F.R. pt. 545.

II. PREEMPTION OF STATE LAW

With regard to the preemption issue, your letters actually identify two separate situations where preemption may arise. First, the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464 and Bank Board regulations could conceivably preempt state laws purporting to prohibit, or otherwise restrict, Federal associations from offering line of credit conversion mortgages. Second, you have asked whether Title VIII of the Garn-St Germain Act preempts

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[5] We also note that "periodic" is defined as both "occurring at regular intervals," and "taking place now and then." See WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 874 (1984). Thus, the literal definition of "periodic," in section 545.33(c) would include the advance feature described in your letter.

state laws which purport to prohibit, or otherwise restrict, state-chartered mortgage lenders from making these line of credit conversion mortgages. These two situations will be discussed separately.

**A. ARE STATE LAWS WHICH PURPORT TO REGULATE LINE OF CREDIT CONVERSION MORTGAGES BY FEDERAL ASSOCIATIONS PREEMPTED?**

A review of preemption law is essential to our analysis. The United States Supreme Court noted in Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152 (1982), that the preemption doctrine is rooted in the Supremacy Clause of the Constitution, U.S. Const., Art. VI, cl. 2, and that Congressional intent determines whether state law is preempted. In de la Cuesta, the Court, relying on its prior rulings, noted that Congress may either explicitly or implicitly preempt state law. Essentially, Congress can preempt state law by three methods. First, Congress may, within Constitutional limits, expressly preempt state law. Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 203 (1983). Second, Congress may implicitly preempt state law by enacting such a pervasive scheme of federal regulation as to imply that federal law shall control the subject. Pacific Gas and Electric Co., 461 U.S. at 203-04. Third, federal law nullifies conflicting state law in situations where Congress has not completely displaced state law. In the third situation, a conflict exists when "compliance with both federal and state

regulations is a physical impossibility,"[6] or state law creates "an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. See de la Cuesta, 458 U.S. at 156; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Federal regulations have no less preemptive effect than federal statutes. Regulations which are intended to preempt state law are subject to judicial review only for the purpose of determining whether the regulator exceeded its authority or acted arbitrarily. De la Cuesta, 458 U.S. at 153-54.

Without addressing the first two theories of preemption, our inquiry will focus on the third situation, where federal law preempts conflicting state law. In other words, we must determine whether state laws which prohibit or otherwise restrict Federal associations from engaging in reverse mortgage transactions are preempted because they conflict with federal law.

Judicial decisions and previous OGC opinion letters provide guidance on this issue. A similar situation was addressed in an OGC opinion letter dated July 2, 1986, which concluded that an Illinois statute was preempted because it was in conflict with a Bank Board regulation.[7]

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[6] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). See de la Cuesta, 458 U.S. at 153.

[7] The Illinois statute prohibited Federal associations from assessing a service charge against accountholders who submitted checks for collection which were subsequently dishonored. Our July 2, 1986 letter concluded that the Illinois statute was in conflict with 12 C.F.R. § 545.11 (1988), which the Board construed as authorizing Federal associations to assess such service charges.

We quote the following passage from our July 2, 1986 opinion letter, which we find to be applicable to your query:

> In de la Cuesta, the Supreme Court found that because a state law prohibited Federal associations from engaging in an activity which was permitted by federal law, a conflict existed and the state law had to give way. In that case, California common law, which limited the enforcement of due-on-sale clauses in mortgage instruments, was held inapplicable to Federal associations due to its conflict with the Board's regulation that permitted Federal associations to include due-on-sale clauses in mortgage instruments and generally to enforce those provisions when the security property was transferred. The Court found a conflict between the state and federal law, which it described as follows: "By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation." Id. at 156 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Above, we determined that line of credit conversion mortgages form part of the lending operations of Federal associations, and as such, they are authorized by 12 C.F.R. § 545. Moreover, Congress by statute has explicitly permitted Federal associations to secure loans with real

estate. 12 U.S.C. § 1464(c)(1)(B). It is axiomatic that the authority to secure loans protects lenders in the event of default on such loans by foreclosing on the property constituting the security.[8] State laws which prevent or otherwise restrict Federal associations from engaging in transactions involving such mortgages, are in conflict with Bank Board regulations.[9]

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[8] The definition of "security" includes a "mortgage . . . given by a debtor in order to [assure] the payment . . . of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation." See BLACK'S LAW DICTIONARY 1522 (4th ed. 1968).

[9] Our position is bolstered by 12 C.F.R. § 545.2, (1988), which states:

> The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. pt. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association.

Please note that 12 C.F.R. § 545.2 was added when Part 545 was amended in 1983. The language of 12 C.F.R. § 545.2 closely parallels the preamble to the former 12 C.F.R. § 545.6-4, which explicitly stated that the Board preempted all inconsistent state laws pertaining to alternative mortgages transactions by Federal associations. See 46 Fed. Reg. 24148, 24151 (April 30, 1981). Reverse mortgages were among those authorized by section 545.6-4 and, consequently, were subject to the preemption of state law.

We, therefore, conclude that the authority of Federal associations to make reverse mortgages is governed solely by the HOLA

The Texas laws in question clearly prevent Federal associations from exercising the authority granted to them by the HOLA and the Board's regulations. Therefore, this Office concludes that the constitution and statutes of Texas under review are "an obstacle to the accomplishment and execution of the purposes and objectives" of 12 C.F.R. pt. 545 to the extent that they prevent Federal associations from securing line of credit conversion mortgages with real estate consisting of homesteads, and foreclosing on such mortgages in the event of default. According to de la Cuesta, the HOLA authorizes the Board to enact regulations that preempt substantive state real property laws purporting to govern the mortgage lending operations of Federal associations.[10] The regulatory history of 12 C.F.R. § 545

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and 12 C.F.R § 545.1, and that 12 C.F.R. § 545.2 establishes that the Bank Board did not cede its authority over such transactions by Federal associations to the states.

[10] The de la Cuesta opinion states:

> These[preemption] principles are not inapplicable here simply because real property law is a matter of special concern to the States" 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' Free v. Bland, 369 U.S. 663, 666 (1962); see also Ridgway v. Ridgway, 454 U.S. 46, 54-55 (1981)

de la Cuesta, 458 U.S. at 153.

reveals that the Board exercised this authority to preempt state real property laws, insofar as reverse mortgages are concerned.

According to our research, one published case, In re Howard, 65 B.R. 498 (1986), has addressed the issue of whether the Texas homestead laws are preempted by federal law. That case, however, arose under the Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1811, et. seq., not the HOLA. In the Howard case, the Federal Deposit Insurance Corporation ("FDIC") in its role of corporate insurer, sought to assert a lien against the homestead of the debtors who filed for protection under Chapter 7 of the Bankruptcy Code. The debtors sought to avoid the lien by invoking the Texas homestead laws, since the FDIC claim was not based on purchase money, improvement loans or tax liabilities.

The Bankruptcy Court held that the Texas homestead laws were not preempted by 12 U.S.C. § 1823, the statute which defines the FDIC's role as corporate insurer. According to the Court's interpretation of the statute, Congress did not, in this context, preempt substantive state law. A relevant passage from the Howard decision states:

> The Court hesitates to upset [the Texas homestead laws], and override the policy decision it represents, without clearer guidance from Congress.

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Another passage in de la Cuesta states that "Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law." 458 U.S. at 162.

> In addition to the absence of a clear expression of Congressional intent, the Court finds no judicial authority for elevating the FDIC to a unique status among lienholders, in complete abrogation of State law.

65 B.R. 498 at 507. (emphasis added).

In the absence of a Congressional mandate to preempt state law, the Bankruptcy Court had to determine the rights of the claimants in the disputed property. The Court relied upon the Supreme Court decision in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).[11] The Supreme Court ruled in Kimbell Foods that federal law determines the rights of the United States government in disputes arising under nationwide federal programs. The problem in both the Howard and Kimbell Foods cases was the lack of substantive federal law pertaining to the priority of claims in disputed property. The Supreme Court decided

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[11] The Kimbell and Howard cases are factually similar in that federal agency obtained an enforceable lien against a debtor in bankruptcy and sought to enforce it against a party who claimed a superior interest in the same property, pursuant to state law. Kimbell actually involved two separate cases which were consolidated by the Supreme Court. In the first case, the Small Business Administration ("SBA") and Kimbell Foods, Inc. each perfected a valid security interest in the same equipment and merchandise of the debtor. Kimbell Foods claimed that its lien was entitled to priority under the Texas version of the Uniform Commercial Code ("UCC"). In the second case, the Farmers Home Administration ("FHA") and a repairman each claimed to have a superior lien in the debtor's tractor. The repairman's claim arose under a Georgia statute.

in Kimbell Foods that whenever there is no substantive federal rule on a particular issue, the federal courts should exercise their common law jurisdiction to give content to the federal law. In such situations, federal courts fill this void by either adopting state law, or by creating uniform federal rules. Based on a three prong test developed in Kimbell Foods, the Howard Court decided to adopt the Texas homestead laws as the appropriate federal rule in cases where the FDIC was acting in the capacity of corporate insurer.[12]

We believe that the rulings in Kimbell Foods and Howard are not controlling insofar as the rights of Federal associations to foreclose on line of credit conversion mortgages in Texas are concerned. As stated above, the Supreme Court ruled in de la Cuesta that the mortgage lending operations of Federal associations are derived solely from the HOLA and Bank Board regulations. More importantly, de la Cuesta states that the Board is not constrained by substantive state law when it exercises its powers to regulate the mortgage lending operations of Federal associations.[13] In contrast to the situations in

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[12] The three factors that the court considered in deciding whether to fashion a uniform federal rule, or to adopt state law are: (1) whether the federal program is one which by its nature requires nationwide uniformity; (2) whether adopting the state law would frustrate the specific objectives of the federal program; and (3) whether applying a uniform rule would disrupt commercial relations predicated on state law. See Kimbell Foods, 440 U.S. at 728-29; In Re Howard, 65 B.R. at 505. In the Howard case, the Bankruptcy Court determined that the third prong of this test required it to adopt state law as the applicable federal rule.

[13] de la Cuesta, 458 U.S. at 153.

Kimbell Foods and Howard, Congress expressly authorized Federal associations to make loans secured by real estate without limitation, thus permitting foreclosure on such security, and authorized the Board to adopt regulations governing the activities of Federal associations. 12 U.S.C. § 1464(a),(c)(1)(B). The Board exercised this authority by enacting regulations that enable Federal associations to offer line of credit conversion mortgages, and did not limit the statutory authority providing that such mortgages may be secured by real property. Accordingly, Board regulations governing the mortgage lending operations of Federal associations provide the substantive federal law that was missing in Kimbell Foods and Howard.

More specifically, the OGC believes that the current situation is distinguishable from the Howard case. In contrast to the Howard situation, we are not concerned with whether a federal agency, in its capacity as receiver of an insolvent Federal association, has a superior claim in a Texas homestead over the borrower on a line of credit conversion mortgage. Instead, our analysis addresses the fundamental issue of whether federal or state law controls the mortgage lending operations of Federal associations. Since all of the authority cited above indicates that federal law is controlling, we opine that Federal associations are authorized to offer, and if the need arises, to foreclose upon line of credit conversion mortgages which are secured by Texas homesteads, despite contrary state law.

## III. DOES FEDERAL LAW PREEMPT STATE LAWS PURPORTING TO PROHIBIT STATE-CHARTERED MORTGAGE LENDERS FROM OFFERING REVERSE MORTGAGES?

Finally, you ask whether federal law would preempt state laws purporting to regulate reverse mortgage transactions by state-chartered lenders who seek to make such loans pursuant Title VIII of the Garn-St Germain Act and the Bank Board's regulations. Unfortunately, we are unable to provide a definitive answer to this question.

Your letters inquire whether the appendix to 12 C.F.R. pt. 545 provide the basis for preempting state laws which purport to regulate alternative mortgage transactions by state-chartered mortgage lenders.[14] The Bank Board's position concerning preemption of state laws insofar as state-chartered mortgage lenders are concerned, is stated as follows:

> Title VIII of the [Garn-St Germain Act] authorizes certain housing creditors to make alternative mortgage transactions, notwithstanding any State constitution, law or regulation. Section [804(a) of the Garn-St Germain Act] specifies that housing creditors other than banks, credit unions, and Federal associations may make alternative mortgage transactions only in accordance with

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[14] Please note that on October 1, 1988, the appendix was superseded by 12 C.F.R. § 545.33(h) (1988). A copy of 12 C.F.R. § 545.33(h) is enclosed for your reference. The only change to this subsection of the regulation pertains to disclosure requirements for adjustable rate mortgages, not preemption.

> regulations governing alternative mortgage transactions issued by the Board for federally chartered savings and loan associations.
>
> *****
>
> Section 807(b) directs the Board to identify, describe and publish those portions of its regulations that are inappropriate for, and thus inapplicable to the non-federally chartered housing creditors.
>
> *****
>
> The Board's approach to the applicability of its regulations is premised on the clear statement of Congressional intent that Title VIII does not place non-federally chartered housing creditors under the supervision of the federal agencies, but instead merely enables them to follow a federal program as an alternative to state law. S.Rep. No. 97-463, 97th Cong., 2d Sess. 55.

48 Fed. Reg. 23032, 23053 (May 23, 1983); See also: 49 Fed. Reg. 43040, 43043 (October 26, 1984).

As noted in the preamble, the Board is not the ultimate arbiter of the permissible scope of activities that state-chartered lenders relying upon Title VIII of the Garn-St Germain Act may engage in. The Board, however, has the responsibility to interpret those regulations which are identified in the Notice to Housing Creditors as being applicable to state-chartered lenders. Above, we determined that two provisions identified in the Notice to Housing Creditors do not prohibit, or otherwise restrict, line of credit conversion mortgages. The Board believes that state-chartered institutions should consult with the appropriate

state regulator about whether such lenders may make certain loans pursuant to Title VIII, notwithstanding contrary state law.

I trust that this letter satisfies your inquiry. If you have any further questions, please contact Richard A. Katz, Attorney, Regulations and Legislation Division, at 202-906-7037.

Sincerely,

/s/
Jack D. Smith
Deputy General Counsel

Enclosure

(3)

Supreme Court, U.S.
FILED
AUG 29 1994
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No. 94-209

In The

# Supreme Court of the United States

October Term, 1994

DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER,

*Petitioners,*

vs.

FIRST GIBRALTAR BANK, F.S.B., AND BENEFICIAL FINANCE, TEXAS, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## OPPOSITION OF RESPONDENTS FIRST GIBRALTAR BANK, F.S.B., AND BENEFICIAL FINANCE, TEXAS, INC.

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## QUESTION RESTATED

Whether the Fifth Circuit correctly concluded that the Federal Home Loan Bank Board's reasonable interpretation of its own regulations, with which the Office of Thrift Supervision fully concurs, deserved deference?

# TABLE OF CONTENTS

Page(s)

Question Restated ..... i

Table Of Contents ..... ii

Table Of Authorities ..... iii

Opinions Below ..... 2

Jurisdiction ..... 2

Summary Of Argument ..... 2

Factual And Procedural Background ..... 4

Reasons For Denying The Petition ..... 14

Conclusion ..... 30

# TABLE OF AUTHORITIES

Page(s)

CASES

*Bowles v. Seminole Rock Co.*, 325 U.S. 410, 65 S.Ct. 1215 (1945) ..... 2, 14, 15, 30

*City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 114 S.Ct. 1588, 1594 n.5 (1994) ..... 14

*Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991) ..... 17

*Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 102 S.Ct. 38 (1981) ..... 16

*Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94 S.Ct. 334 (1973) ..... 3, 25

*Fidelity Federal v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982) ..... *passim*

*First Gibraltar v. Morales*, 19 F.3d 1032 (5th Cir. 1994) ..... *passim*

*Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089 (1962) ..... 8

*Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62, 89 S.Ct. 1519 (1969) ..... 15

*Ludwig v. Variable Annuity Life Ins. Co.*, 998 F.2d 1295 (5th Cir. 1992), *cert. granted*, 114 S.Ct. 2161 (1994) ..... 14

*Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333, (1986) ..... 15

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835 (1989) ..... 15

*Stinson v. United States*, ___ U.S. ___, 113 S.Ct. 1913 (1993) ..... 2

*Thorpe v. Housing Authority*, 393 U.S. 268, 89 S.Ct. 518 (1969) ..... 3, 16

TABLE OF AUTHORITIES – Continued

Page(s)

*Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965). . . .2, 15

*United States v. City of Chicago*, 400 U.S. 8, 91 S.Ct. 18 (1970) . . . . . 15

*United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150 (1977) . . . . . 15

*United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132 (1983) . . . . . 8

*United States v. Yazell*, 382 U.S. 346, 86 S.Ct. 500 (1966) . . . . . 28

*Weber v. Heaney*, 793 F.Supp. 1438 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993) . . . . . .15, 16

*Wisconsin League of Financial Institutions, Ltd. v. Galecki*, 707 F.Supp. 401 (W.D.Wis. 1989) . . . . . 21

CONSTITUTION

Tex. Const. art. XVI, § 50 . . . . . 5

STATUTES

28 U.S.C. § 1254 . . . . . 2

Alternative Mortgage Transaction Parity Act ("Parity Act") as Title VIII of the Garn-St. Germain Depository Institution Act of 1982. Pub. L. 97-320, 96 Stat. 1469, 1545, as codified at 12 U.S.C. §§ 3801-3806 (1982) . . . . . .7, 26, 27

Home Owners' Loan Act, 12 U.S.C. § 1461-70 (1988 & Supp. IV 1992) ("HOLA") . . . . . .9, 21

TABLE OF AUTHORITIES – Continued

Page(s)

Housing and Community Development Act of 1987, 12 U.S.C. § 1715z-20(c) ..... 10

TEX. PROP. CODE ANN. § 41.001 ..... 5

REGULATIONS

12 C.F.R. § 545.1 (1983) ..... 8, 9

12 C.F.R. § 545.2 (1992) ..... 9, 24

12 C.F.R. § 545.32(b)(4) (1993) ..... 18

12 C.F.R. § 545.32(c)(2) (1993) ..... *passim*

12 C.F.R. § 545.33(a) (1993) ..... 19

12 C.F.R. § 545.33(h) (1993) ..... 20

12 C.F.R. § 545.34 (1993) ..... 19

12 C.F.R. § 545.6-4(a)(2) (1982) ..... 6, 18, 22, 24, 27

12 C.F.R. § 545.8-3(f) (1982) ..... 24

FEDERAL REGISTER

43 Fed. Reg. 59,336, 59,336 (December 20, 1978) .. 4, 5, 18

46 Fed. Reg. 24148, 24151-52 (April 30, 1981) ..... 6, 24

46 Fed. Reg. 51893, 51893 (October 23, 1981) ..... 6, 21

46 Fed. Reg. 51893, 51896 (October 23, 1981) ..... 6

46 Fed. Reg. 24,148, 24,151 (April 30, 1981) ..... 4, 24

48 Fed. Reg. 23032, 23032 (May 23, 1983) ... 8, 9, 20, 21

48 Fed. Reg. 23032, 23036 (May 23, 1983) ..... 23

TABLE OF AUTHORITIES – Continued

Page(s)

48 Fed. Reg. 23032, 23037-38 (May 23, 1983).....19, 22

48 Fed. Reg. 23032, 23040 (May 23, 1983) ..... 20

OTHER AUTHORITIES

2 K. Davis, ADMINISTRATIVE LAW TREATISE § 7:22, pp. 105-107 (2d ed. 1979) ..... 15

ALTERNATIVE MORTGAGE INSTRUMENTS RESEARCH STUDY (FHLBB 1977) ..... 26

Fed. Banking L. Rep. (CCH) ¶ 82,502 (Aug. 4, 1989) (Office of General Counsel)..... 9, 10, 11, 26

Texas Consumer Credit Commissioner, Interpretative Letter No. 86-6 (Dec. 16, 1986) ..... 16

TEXAS HOUSE RESEARCH ORGANIZATION, No. 147, SPECIAL LEGISLATIVE REPORT: SECOND MORTGAGES AND THE TEXAS HOMESTEAD EXEMPTION 30 (Dec. 21, 1988)..... 18

No. 94-209

In The

# Supreme Court of the United States

October Term, 1994

DAN MORALES, AS ATTORNEY GENERAL
FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY,
AS TEXAS CONSUMER CREDIT COMMISSIONER,

*Petitioners,*

vs.

FIRST GIBRALTAR BANK, F.S.B.,
AND BENEFICIAL FINANCE, TEXAS, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

## OPPOSITION OF RESPONDENTS FIRST GIBRALTAR BANK, F.S.B., AND BENEFICIAL FINANCE, TEXAS, INC.

Respondents First Gibraltar Bank, F.S.B. and Beneficial Finance Texas, Inc. respectfully request that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

Petitioner's Appendices provide the pertinent opinions.

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254.

## SUMMARY OF ARGUMENT

The Petitioner asks this Court to grant writ of certiorari in order to determine the amount of deference due a federal agency's interpretation of its own regulations. This Court resolved that question at least as early as 1945. *See Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217 (1945) (when a case "involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt"). In fact, this Court has consistently held that an agency's interpretation of the regulations that it has promulgated has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801 (1965) (quoting *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217). *See also Stinson v. United States*, ___ U.S. ___, 113 S.Ct. 1913, 1919 (1993).

The Petitioner, however, emphasizes that the agency's opinion occurred in an Office of General Counsel advisory letter, suggesting that it was the private opinion of an individual attorney. (Pet. at 10). An Office

of General Counsel letter, however, is the agency's opinion. *See e.g., Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339 (1973) (general counsel's advisory letter was agency's interpretation); *Thorpe v. Housing Authority*, 393 U.S. 268, 276, 89 S.Ct. 518, 523 (1969) (Court examined letters by staff members, as well as contrasting language in another circular, to determine that HUD intended circular to be mandatory). The Federal Home Loan Bank Board ("FHLBB"), moreover, issued its opinion to a cabinet-level agency of the federal government (the Department of Housing and Urban Development ("HUD")), the letter was published by Commerce Clearing House, and the Office of Thrift Supervision ("OTS," the successor to the FHLBB)[1] has confirmed its complete agreement with the FHLBB opinion. *See* Brief of Amicus Curiae, The Office of Thrift Supervision (Res. App. 1). Thus the FHLBB's Office of General Counsel interpretative letter can hardly be considered the private opinion of individual attorney.

Furthermore, the Fifth Circuit's observation that an agency's interpretation of its own regulations deserves deference unless unreasonable occurs only in an alternative holding. *First Gibraltar v. Morales*, 19 F.3d 1032, 1047 (5th Cir. 1994) (Pet. A-30) ("Even assuming for the sake of argument that 12 C.F.R. § 545.32(c)(2) creates some ambiguity as to the authority of federal savings associations to engage in RAMs and line of credit conversion mortgages, we must give substantial deference to agency

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[1] The Federal Home Loan Bank Board, and its successor, the Office of Thrift Supervision, will sometimes be referred to collectively as the "Agency."

interpretations of these regulations that resolve the ambiguity."). The Fifth Circuit had ample, independent support in the history, content, purpose, and structure of the regulations for its conclusion that the Federal Home Loan Bank Board intended to supersede state law when it authorized alternative mortgage instruments nationwide. *Id.* at 1045 (Pet. A-26). In fact, the Petitioner's argument that the regulations may be ambiguous merely suggests that the Fifth Circuit's alternative holding should be reached: it does not suggest that the Fifth Circuit's opinion was incorrect, much less a reason for granting the writ.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1978, the Federal Home Loan Bank Board authorized the use of three new varieties of mortgage instruments: the variable rate mortgage, the graduated payment mortgage, and the reverse annuity mortgage. 43 Fed. Reg. 59,336, 59,336 (1978) (regulation effective Jan. 1, 1979) ("The variable rate mortgage will . . . be authorized on a state-by-state basis; the graduated payment mortgage and reverse-annuity mortgage are hereby authorized nationwide.") (Res. App. 16). Although these instruments are now commonplace, they were considered radical innovations at the time, and they conflicted with the law of a majority of states. *See e.g.*, 46 Fed. Reg. 24,148, 24,151 (1981) (Res. App. 17). Both the graduated payment mortgage, for example, and the reverse annuity mortgage violated the usury laws of as many as thirty states that proscribed the charging of interest on interest. *Id.* ("[t]his preemption has the effect of precluding the

application of the laws of approximately 30 states prohibiting the charging of interest on interest. . Nevertheless, after years of careful study, including a three volume research study, hearings before Congress, and a notice and comment period, the Agency authorized alternative mortgage instruments nationwide, concluding that they are necessary in order "to meet the needs of homeowners during different phases of their financial life cycles." 43 Fed. Reg. 59,336, 59,336 (1978) (Res. App. 16).

The authorization of reverse mortgages also directly conflicted with the uniquely severe provisions of the Texas homestead exemption law. Texas law invalidates any lien on a homestead not created in order to purchase, construct improvements, or pay property taxes on the homestead. TEX. CONST. art. XVI, § 50; *see also* TEX. PROP. CODE ANN. § 41.001. Furthermore, the homestead exemption cannot be waived. *Id.* ("No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided") (Pet. A-68). Reverse mortgages conflict with the Texas homestead exemption law because they are secured by home equity and are seldom, if ever, used to pay property taxes or to construct home improvements. Thus Texas homeowners cannot obtain loans secured by home equity for such purposes as to pay for a child's education, to supplement retirement income, or to start or expand a small business. Even when the homeowner can obtain an unsecured loan, the loan generally has a higher rate of interest, and the interest cannot be deducted from the homeowner's federal income taxes.

In 1981, the Agency amended its alternative mortgage transactions regulation in order "to enhance associations' ability to balance the yields of their investment portfolios with their liabilities, and to meet borrowers' needs for additional home-financing options." 46 Fed. Reg. 51893, 51893 (October 23, 1981) (summary to final rule) (Res. App. 16). The Agency also reasoned that the amended reverse mortgage regulation would "greatly improve the marketability of [reverse annuity mortgage] loans, which have not been widely used by federal associations." 46 Fed. Reg. 51893, 51895 (October 23, 1981) (Res. App. 16).

Significantly, the Agency chose to emphasize its preemption of conflicting state law by adding an express preemption. 46 Fed. Reg. 24148, 24151-52 (April 30, 1981) (Res. App. 17). Consequently, the Agency inserted a new paragraph into the amended regulation stating that "[t]his exercise of the Board's authority is preemptive of any state law purporting to address the subject of a federal association's ability or right to make, purchase, or participate in the alternative mortgage instruments set forth in this section [545.6-4], or to directly or indirectly restrict such ability or right." 46 Fed. Reg. 24148, 24151 (April 30, 1981) (Res. App. 17); 12 C.F.R. § 545.6-4(a)(2) (1982) (Pet. A-76). This amended regulation included reverse mortgages. *Id.* Furthermore, when the Agency amended its reverse mortgage regulation a few months later, it specifically explained that the express preemption in "the alternative mortgage instruments regulation. . . . covers the [reverse annuity mortgage] amendments as well." 46 Fed. Reg. 51893, 51896 (October 23, 1981) (Res. App. 18). As the Fifth Circuit specifically concluded, the regulations in effect in 1982 undoubtedly preempted the

conflicting provisions of Texas law. 19 F.3d at 1044 (Pet. A-24) ("We think it clear that, had this action been brought under the regulatory scheme in place in 1982, Texas' homestead laws would be preempted by the clear intent of the FHLBB in promulgating its regulations regarding RAMs.").

In 1982, Congress not only approved of the Agency's preemption of state law with regard to alternative mortgage transactions, it extended that preemption to non-federally chartered housing creditors by enacting the Alternative Mortgage Transaction Parity Act ("Parity Act") as Title VIII of the Garn-St. Germain Depository Institution Act of 1982. Pub. L. 97-320, 96 Stat. 1469, 1545, as codified at 12 U.S.C. §§ 3801-3806 (1982). The express purpose of the Parity Act was to end discrimination between federally and nonfederally chartered housing creditors by authorizing all housing creditors[2] to "make, purchase and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies."[3] 12 U.S.C. § 3801(b). Consequently, Congress expressly provided that the Parity Act should prevail "notwithstanding any state constitution, law or regulation." 12 U.S.C. § 3803(c).

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[2] A "housing creditor" is "any person who regularly makes loans, credit sales or advances secured by interests in [homes] or any transferee of any of them." 12 U.S.C. § 3802(2)(C and D).

[3] Banks may engage in alternative mortgage transactions subject to Comptroller of the Currency ("OCC") regulations, and credit unions may engage in such transactions subject to National Credit Union Administration ("NCUA") regulations. All other housing creditors may engage in such transactions subject to OTS regulations.

Also in 1982, this Court recognized the FHLBB's authority to preempt state law with regard to the mortgage lending activities of federal savings associations in *Fidelity Federal v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982). In finding authority to preempt California mortgage and foreclosure law, this Court observed that "Congress expressly contemplated, and approved the Board's promulgation of regulations superseding state law." *Id.* at 162, 3027. Furthermore, the Court recognized that federal preemption is not "inapplicable . . . simply because real property law is a matter of special concern to the States." *Id.* at 153, 3022 (quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092 (1962)). Indeed, "a savings and loan's mortgage lending practices are a critical aspect of its 'operation,' over which the Board unquestionably has jurisdiction." *Id.* at 167, 3029-30. Significantly, *Free v. Bland*, on which the Court relied for this proposition, involved Department of the Treasury regulations that preempt Texas community property law. *See also United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132 (1983) (preempting Texas homestead law).

In 1983, the Agency responded to enhanced authority under the Garn-St. Germain Act by authorizing federal savings associations to engage in all forms of investment activities authorized by the Home Owners Loan Act ("HOLA") unless otherwise restricted under Agency regulations. 48 Fed. Reg. 23032, 23032 (May 23, 1983) (Res. App. 19); 12 C.F.R. § 545.1 (1983). Consequently, the Agency ended its practice of granting specific authority, and instead authorized federal associations to engage in all investment activities permitted under the HOLA unless otherwise prohibited by Agency regulations. As part of that change in regulatory philosophy, the Agency

deleted regulations granting specific authority, including the alternative mortgage transactions regulation, moving the preemption of state law contained in that section to section 545.2. The Agency, moreover, emphasized that it was not eliminating any existing authority, including the authority to engage in alternative mortgage transactions. 48 Fed. Reg. 23032, 23032 (1983) ("The Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised.") (Res. App. 19).

Under the new regulations, federally-chartered savings and loan associations may engage in "loans on the security of liens upon residential real property." 12 U.S.C. § 1464(c)(1)(B). That authority is limited only by Agency regulations, which specifically permit a federally-chartered association to "exercise all authority granted . . . by the [HOLA] . . . whether or not implemented specifically by Office regulations, subject to the limitations and interpretations contained in this part." 12 C.F.R. § 545.1. As the Agency observed in its Office of General Counsel interpretative letter, alternative mortgage transactions "are, in fact, loans on the security of residential real estate." Fed. Banking L. Rep. (CCH) ¶ 82,502 (Aug. 4, 1989) (Pet. A-77, 81). Thus "Federal associations may offer such mortgages to their borrowers, subject only to the restrictions of 12 C.F.R. pt. 545." *Id.* (Pet. A-81-82). Furthermore, the Agency continued to preempt "any state law purporting to address the subject of the operations of a Federal savings association," which, as the Agency observed in its Office of General Counsel letter, establishes that the Agency did not cede its authority over alternative mortgage transactions to the states. *Id.* (Pet. A-87-88, n.9). Under this grant of authority, federal

associations in forty-nine states other than Texas engage in alternative mortgage transactions secured by home equity.

In 1987, Congress confirmed the Parity Act's preemption of state law pertaining to alternative mortgage transactions by authorizing the Secretary of the Department of Housing and Urban Development to implement a demonstration program of insurance of reverse mortgages for elderly homeowners despite contrary state law. Housing and Community Development Act of 1987, 12 U.S.C. § 1715z-20(c). When HUD attempted to implement the program in Texas, however, it discovered that lenders were unwilling to participate because of the state's homestead exemption law.

After examining the applicable Bank Board regulations, and the Alternative Mortgage Transactions Parity Act, HUD concluded that the Bank Board had preempted the conflicting provisions of Texas law. Consequently, it requested an interpretative letter from the Bank Board's Office of General Counsel confirming the preemption. HUD, Request for Agency Opinion, by John A. Maxim, Jr., dated Nov. 16, 1988 (opining that the express preemption in the Parity Act "and the applicable [FHLBB] regulations are broad enough to include reverse mortgages in Texas.") (Res. App. 23). The Bank Board responded with an Office of General Counsel letter dated August 4, 1989. Fed. Banking L.Rep. (CCH) ¶ 82,502, at 61,707-08 (August 4, 1989) (Pet. A-77).

After reviewing the applicable regulations, case law, and other opinion letters, the Bank Board concluded that the HOLA authorized the Agency to enact regulations that preempt substantive state real property laws purporting to govern the mortgage lending operations of

federal associations, and that the Agency "exercised this authority to preempt state real property laws, insofar as reverse mortgages are concerned." Office of General Counsel Interpretative Letter, Fed. Banking L. Rep. (CCH) ¶ 82,502 (Pet. A-89). The Agency observed that its 1979 alternative mortgage transactions regulation authorized the use of reverse mortgages in Texas, and that the Agency's 1983 change in regulatory approach evinced no intent to cede that authority to the states. *Id.* (Pet. A-79-81). The Agency concluded, therefore, that "[t]he Texas laws in question clearly prevent Federal associations from exercising the authority granted to them by the HOLA and the Board's regulations." *Id.* (Pet. A-88). Thus "the constitution and statutes of Texas under review are 'an obstacle to the accomplishment and execution of the purposes and objectives' of 12 C.F.R. pt. 545 to the extent that they prevent Federal associations from securing line of credit conversion mortgages with real estate consisting of homesteads, and foreclosing on such mortgages in the event of default." *Id.* The pertinent regulations are essentially unchanged since 1989, when the FHLBB issued its Office of General Counsel letter to HUD. Furthermore, the Office of Thrift Supervision, as the successor to the FHLBB, continues to fully concur in the FHLBB's opinion, and in fact, submitted an amicus brief to the Fifth Circuit strongly supporting Respondent's position. (Res. App. 1).

After examining the FHLBB Office of General Counsel letter, Bruce Gibson, Chairman of the Government Organization Committee of the Texas House of Representatives, requested an opinion from the Texas Attorney General confirming that FHLBB regulations authorizing

alternative mortgage transactions preempted the conflicting Texas restrictions on home equity lending. The Attorney General declined to express an opinion on whether FHLBB regulations preempt the conflicting provisions of the Texas homestead exemption law with regard to federal savings associations. No. JM-1269 (1990). The Attorney General, however, specifically invited litigation "in which the relevant state and federal policies can be thoroughly briefed and argued." *Id.*

Respondents, First Gibraltar Bank, F.S.B., and Beneficial Texas, Inc., responded by seeking a declaration in federal district court that federal law preempts Texas homestead law to the extent that Texas law prohibits federal savings associations from enforcing liens taken in alternative mortgage transactions secured by a homeowner's equity, and that this federal preemption extends to state-chartered institutions under the Parity Act. In addition, Respondents sought appropriate injunctive relief to carry out those declarations. Both sides moved for summary judgment. The district court denied the plaintiffs' motion and granted summary judgment in favor of the defendants. *First Gibraltar v. Morales*, 815 F.Supp. 1008 (W.D.Tex.1993) (Pet. A-48). In its opinion, the district court acknowledged that the OTS has the authority to preempt state law with regard to the mortgage investment activities of federal savings associations, and that whether the OTS exercised that authority was a question of Agency intent. *Id.* at 1012-13 (Pet. A-59). In addition, the district court recognized that the OTS issued an interpretative letter stating specifically that Agency regulations had preempted Texas law with regard to the enforceability of reverse mortgages and line-of-credit conversion mortgages secured by a homeowner's equity,

and that the Agency's opinion was entitled to great deference.[4] *Id.* at 1014-15 (Pet. A-63). The district court, however, concluded, that an OTS regulation permitting federal associations to take security interests in timeshare units made the Agency's interpretation of its own regulations arbitrary and unreasonable. *Id.* (Pet. A-64). The Fifth Circuit reversed, concluding that OTS regulations preempt Texas homestead restrictions on home equity lending, at least with regard to reverse mortgages and line-of-credit conversion mortgages, and that Congress in the Parity Act extended that preemption to state housing creditors. 19 F.3d at 1049, 1053 (Pet. A-36, 46-47). In addition, the Fifth Circuit concluded that the Agency's interpretation of its regulations was reasonable, and that the definition of "security property," which was meant to expand the authority of federal associations to accept non-traditional forms of security, did not preclude the Agency from authorizing alternative mortgage instruments in Texas. *Id.* at 1046-47 (Pet. A-28-30).

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[4] Both line-of-credit conversion mortgages and reverse mortgages are alternative mortgage transactions secured by a homeowner's equity. A "line-of-credit conversion mortgage," in fact, is essentially a variant of the reverse mortgage. Office of General Counsel interpretative letter (Pet. A-78). Both kinds of instruments permit the homeowner to convert home equity into liquid assets. The principal difference is that reverse mortgages generally provide for payments at regular intervals whereas home equity conversion mortgages allow the homeowner to receive a payment or payments on demand. *Id.*

## REASONS FOR DENYING THE PETITION

According to the Petitioner, this Court should grant writ of certiorari in order to decide the degree of deference that should be accorded an agency's interpretation of its own regulations. (Pet. at 8) This Court has decided that question since at least 1945. *See Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217 (1945). In arguing that the degree of deference is an open question, the Petitioner cites a case in which the Court's resolution of the merits made it unnecessary for the Court to consider whether an agency's *statutory* interpretation contained in a memorandum is entitled to any less deference than an interpretation adopted by rule or adjudication. (Pet. at 8-9) (citing *City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 114 S.Ct. 1588, 1594 n.5 (1994)).[5] Even if that question could be considered open, it is not present in this case.[6]

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[5] The Petitioner also cites *Ludwig v. Variable Annuity Life Ins. Co.*, which involves an agency's statutory interpretation that the Fifth Circuit found directly conflicted with the statute itself. 998 F.2d 1295 (5th Cir. 1992), *cert. granted*, 114 S.Ct. 2161 (1994).

[6] For purposes of his Petition, the Attorney General has not questioned the authority of the Agency to preempt the conflicting provisions of the Texas homestead exemption law. (Pet. at 22 n.11). The Petitioner, however, appears to question whether the authorization of alternative mortgage instruments is regulation of the "operations" of a federal association. (Pet. at 18). As this Court has explained, however, the Agency's authority must extend to promulgating preemptive "regulations governing mortgage loan instruments, for mortgages are a central part of any savings and loan's 'operation.' " *De la Cuesta*, 458 U.S. at 161, 102 S.Ct. at 3026. In fact, it is difficult to conceive of a matter more critical to a savings and loan's operations than the

Rather, this case involves the agency's interpretation of its own regulations. Because the administrator has special expertise with regard to the history, background, and intent of agency regulations, this Court has consistently held that "a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt." *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217. In fact, the agency's interpretation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801 (quoting *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850 (1989); *Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341 (1986); *United States v. Larionoff*, 431 U.S. 864, 872-73, 97 S.Ct. 2150, 2155-56 (1977); *United States v. City of Chicago*, 400 U.S. 8, 10, 91 S.Ct. 18, 20 (1970); *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62, 72, 89 S.Ct. 1519, 1525-26 (1969); 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 7:22, pp. 105-107 (2d ed. 1979).

The Petitioner also contends that "[t]he court of appeals failed to apply this Court's standards as to when courts should defer to official agency *statutory* interpretations." (Pet. at 11) (emphasis added). This case involves the Agency's regulatory interpretation, and this Court, moreover, has never required that a court consider all of the factors that the district court listed in *Weber v. Heaney*, 793 F.Supp. 1438, 1455 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993). In fact, the *Heaney* court considered only that Federal Election Commission was "precisely the type of agency to which deference

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regulation of the kind of home mortgages that it can offer to borrowers.

should be afforded." *Heaney*, 793 F.Supp. at 1455 (quoting *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38. 102 S.Ct. 38, 44-45 (1981)). It deserved deference, the court reasoned, because "Congress vested the agency with plenary authority, both rulemaking and adjudicative, to regulate the conduct of federal elections." *Id.* Similarly, Congress delegated plenary authority to the FHLBB (now the OTS) to regulate the operations of federal savings associations. *Fidelity Federal v. de la Cuesta*, 458 U.S. 141, 167, 102 S.Ct. 3014, 3029-30 (1982). And that authority includes promulgating preemptive regulations pertaining to the mortgage lending activities of federal savings associations. *Id.* ("a savings and loan's mortgage lending practices are a critical aspect of its 'operation,' over which the Board unquestionably has jurisdiction."). In fact, the only factor listed in *Heaney* that does not strongly support the Fifth Circuit's position is that Texas lenders have been unwilling to rely on the Agency's opinion by engaging in home equity lending. That reluctance, however, is understandable because any financial institution that desires to make loans in violation of the state's homestead law not only risks losing its security, but may also be subject to state enforcement actions, including loss of license, cease and desist orders, and civil damage actions under the states consumer protection laws. *See e.g.*, Texas Consumer Credit Commissioner, Interpretative Letter No. 86-6 (Dec. 16, 1986).

In addition, the Petitioner suggests that the Agency's interpretation of its *regulations* do not deserve deference because that interpretation is not embodied in a *regulation*. (Pet. 14). This Court, however, has never held that an agency can interpret its regulations only by promulgating a new regulation. *See e.g., Thorpe v. Housing Authority*, 393 U.S. 268, 276, 89 S.Ct. 518, 523 (1969) (letters by staff

members, as well as contrasting language in another circular, were used to determine that a HUD circular was intended to be mandatory).

The Petitioner also contends that a conflict in the circuits exists with regard to the amount of deference due an agency's interpretations respecting preemption. (Pet. at 13) (citing *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991)). Again, even assuming the existence of a question on that issue, it is not clearly presented in this case because the Fifth Circuit did not merely defer to the Agency's conclusions concerning preemption. It concluded independently that a preemption had occurred, and that the Agency's interpretation of its regulations was reasonable. *First Gibraltar*, 19 F.3d at 1044, 1049 (Pet. A-24, 36). Furthermore, the Agency clearly has expertise with regard to the history and intent of its regulations, which were the critical issues that the Fifth Circuit examined. *Id.* at 1044 (Pet. A-36). In fact, the Tenth Circuit acknowledged that an agency's interpretation concerning the scope and application of its regulations requires deference. *Harmon*, 951 F.2d at 1579.

Furthermore, the Fifth Circuit considered the question of deference only in an alternative holding. *First Gibraltar v. Morales*, 19 F.3d 1032, 1047 (5th Cir. 1994) (Pet. A-30) ("Even assuming for the same of argument that 12 C.F.R. § 545.32(c)(2) creates some ambiguity as to the authority of federal savings associations to engage in RAMs and line of credit conversion mortgages, we must give substantial deference to agency interpretations of these regulations that resolve the ambiguity."). In fact, the Fifth Circuit had ample support for its conclusion that the Agency preempted the conflicting provisions of Texas law, without reference to the Agency's General Counsel

letter, in the history, purpose, structure, and content of the agency's regulations. *Id.* at 1045 (Pet. A-26).

In examining the history of the regulation, the Fifth Circuit observed that if this lawsuit had been brought in 1982, rather than 1992, that no doubt could exist that the agency had preempted Texas law. *Id.* at 1044 (Pet. A-24) ("We think it clear that, had this action been brought under the regulatory scheme in place in 1982, Texas' homestead laws would be preempted by the clear intent of the FHLBB in promulgating its regulations regarding RAMs"). The regulations in effect prior to 1983 expressly preempted any state laws that "directly or indirectly" restrict the ability of federal savings associations to engage in graduated payment or reverse annuity mortgages. *Id.* at 1045 (Pet. A-25) (citing 12 C.F.R. § 545.6-4(a)(2) (1982)). They preempted Texas law because Texas law invalidates the liens taken in connection with such mortgages. *Id.* at 1044-45 (Pet. A-24-25). The Texas homestead laws also directly conflicted with the Agency's express purpose to "meet the needs of homeowners during different phases of their financial life cycles." 43 Fed. Reg. 59,336, 59,336 (1978). As the Fifth Circuit observed, these restrictions have resulted in removing "from $150 to $260 [b]illion in home equity from the lending market, illustrating the substantial limitation on the ability of federal savings associations to make [reverse mortgages] in Texas." *First Gibraltar*, 19 F.3d at 1044-45 (Pet. A-25) (citing Texas House Research Organization, No. 147, Special Legislative Report: Second Mortgages and the Texas Homestead Exemption 30 (Dec. 21, 1988)).

Furthermore, the Fifth Circuit found "that the FHLBB did not manifest an intent to end its preemption of inconsistent state laws, such as Texas' homestead laws, in its 1983 revision of its real estate lending regulations." *Id.* at 1045 (Pet. A-26). In reaching that conclusion, the Fifth Circuit observed that current OTS regulations assume that federal associations will be able to enter into and enforce home equity loans. *Id.* at 1045-46 (Pet. A-26-27). Section 545.32(b)(4), for example, provides that "a real estate loan may be fully amortized, partially amortized, non-amortized, or a line-of-credit loan, and the loan contract may provide for the deferral and capitalization of a portion of the interest." 12 C.F.R. § 545.32(b)(4) (1993). This provision specifically authorizes federal savings associations to make line-of-credit loans and reverse mortgages by authorizing the amortization techniques associated with reverse mortgages, and by stating that "a real estate loan may be . . . a line of credit loan." *Id.*

The regulation governing home loans, moreover, authorizes federal associations to use loan contracts that "provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made." 12 C.F.R. § 545.33(a) (1993). This provision describes reverse mortgages. The preamble to the final regulations, moreover, explicitly states that "loan contract[s] may provide for negative amortization of a portion of the interest, or of all interest on a loan such as a *reverse annuity mortgage*." 48 Fed. Reg. 23032, 23,037-38 (emphasis added) (Res. App. 21). In addition, the Agency explained in the summary to the final rule that 12 C.F.R. § 545.34 "would require disclosure of provisions in a contract for a reverse annuity mortgage under which the outstanding loan principal may become due and

payable as a result of the borrower's death, upon maturity of the loan, or upon a failure to maintain the security property." 48 Fed. Reg. 23032, 23040 (May 23, 1983) (Res. App. 22). These provisions establish that federal associations continued to have the power to engage in alternative mortgage transactions secured by a homeowner's equity.

The Agency's "notice of housing creditors regarding alternative mortgage transactions" provides additional evidence that the Agency did not intend to eliminate the authority previously granted to engage in alternative mortgage transactions. 12 C.F.R. § 545.33(h). The Agency observes in that section that housing creditors, other than federal savings associations, may engage in alternative mortgage transactions, as defined in the Parity Act, "notwithstanding any state constitution, law or regulation." *Id.* It then identifies OTS regulations that place a restriction upon the ability of such creditors to engage in alternative mortgage transactions. None of the listed provisions prevents a lender from engaging in home equity loans.[7] *Id.* In fact, the section that the Petitioner contends places a limitation on a federal association's right to engage in alternative mortgage transactions, section 545.32(c), is not referred to in this section as a limiting provision. *Id.*

Furthermore, continued authority to engage in home equity lending is consistent with the structure of the Agency's amended regulations, which were meant "to

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[7] The listed provisions concern matters such as the creditor's ability to adjust the interest rate, payment balance, or term to maturity; the deferral and capitalization of interest on loans to natural persons secured by owner-occupied residential property; and the disclosures that the creditor must make to the borrower.

grant associations the maximum flexibility to exercise the authorities of the HOLA." 48 Fed. Reg. 23032, 23032 (May 23, 1983). *See also, Wisconsin League of Financial Institutions, Ltd. v. Galecki*, 707 F.Supp. 401 (W.D.Wis. 1989) (finding structure of OTS regulations support preemption of state law). The Agency specifically stated, in fact, that its sole purpose in revising Part 545 was "to permit Federal associations to engage in all activities authorized by statute subject to these regulations and to. . . . expand the investment authority of, and services offered by, Federal associations." 48 Fed. Reg. 23032, 23032 (May 23, 1983) (Res. App. 19).

Preemption is also consistent with the Agency's purpose "to enhance associations' ability to balance the yields of their investment portfolios with their liabilities, and to meet borrowers' needs for additional home-financing options." 46 Fed. Reg. 51893, 51893 (October 23, 1981) (summary to final rule) (Res. App. 16). In addition, it is consistent with Congress' purpose in enacting the HOLA "to provide the country with sources of housing financing at a time when 'more than half the counties in the country, containing almost one-fifth of the total population were without home-financing institutions." *First Gibraltar*, 19 F.3d at 1051 (Pet. A-41) (quoting *de la Cuesta*, 458 U.S. at 159-60, 102 S.Ct. at 3026). That purpose has been "expanded in 12 U.S.C. § 1464(a), which authorizes the OTS to regulate the organization and operation of federal savings associations '[i]n order to provide thrift institutions for the deposit of funds and the extension of credit for homes and other goods and services.' " *Id.* (Pet. A-42). The decision to make home equity lending available in Texas, the Fifth Circuit reasoned, and "thereby greatly expanding the pool of collateral available to Texans for borrowing purposes, is entirely consistent with the HOLA's

purpose of ensuring the broadest availability of credit for general consumer purposes." *Id.* Finally, the Agency's decision to authorize alternative mortgage instruments nationwide is consistent with Congress' purpose in the Alternative Mortgage Transactions Parity Act to increase the "supply of credit secured by residential property." *Id.*

Thus, as the Fifth Circuit concluded, the ability of federal savings associations to engage in alternative mortgage transactions, previously granted by 12 C.F.R. § 545.6-4 (1982), was undiminished by the regulatory change in 1983. *Id.* at 1045 (Pet. A-26). In fact, the Agency specifically stated with respect to reverse mortgages that "the substance of these provisions is unchanged from the Board's prior regulations." 48 Fed. Reg. 23032, 23037-38 (May 23, 1983) (Res. App. 21).

As the Fifth Circuit concluded, these materials, taken together, demonstrate the Agency's intent to preempt Texas homestead law insofar as it would prohibit federal savings associations from entering into alternative mortgage transactions. *First Gibraltar*, 19 F.3d at 1044 (Pet. A-24-25). The Fifth Circuit also concluded that a definition of "security property," which was meant to expand the ability of federal associations to accept non-traditional forms of security, such as interests in time-share units, did not preclude the authorization of alternative mortgage instruments in Texas. 12 C.F.R. § 545.32(c)(2) (1993); (Pet. 18-19).

As the Fifth Circuit correctly observed, the history of this definitional section establishes that the Agency did not intend to limit home equity lending. *First Gibraltar*, 19 F.3d at 1046-48 (Pet. A-28-30). As the preamble to the 1983 revision of the regulations establishes, the Agency

adopted section 545.32(c) to deal with the problem of classifying property interests in time share units. *Id.* at 1046 (Pet. A-28). Before the 1983 revision, the Agency authorized loans on time-share units only as consumer loans. *Id.* (citing 48 Fed. Reg. 23032, 23036 (May 23, 1983)). "The FHLBB promulgated § 545.32(c) 'in order to make clear what is required for a loan to be secured by real estate.' " *Id.* The Agency provided under the revised regulation that "an association may make a real estate loan on the security of a time-share unit if the security property is real estate under state law." *Id.* Thus, as the OTS explained in its amicus brief to the Fifth Circuit, the sole purpose of section 545.32(c)(2) was to authorize federal savings associations to accept non-traditional security interests, such as interests in time-share units, when state law grants the rights and remedies usually associated with "a real estate mortgage or its equivalent." 12 C.F.R. § 545.32(c)(2).

The Fifth Circuit also observed, in an alternative holding, that "[e]ven assuming for the sake of argument" that the definition of "security property" created some uncertainty, "[a]ny ambiguity regarding agency intent arising from the text of the regulations themselves may be dispelled by reasonable agency constructions of the regulations." *First Gibraltar*, 19 F.3d at 1045 (Pet. A-25). In fact, the Fifth Circuit had ample authority for looking to the Agency's interpretation of its regulations to resolve any potential ambiguity because this Court followed the same approach in *Fidelity Federal v. de la Cuesta*, 458 U.S. at 158, 102 S.Ct. at 3025.

The regulation at issue in *de la Cuesta* appeared to make the validity of due-on-sales clauses dependent on state contract law. It stated that "[a federal savings and

loan] association continues to have the power to include, *as a matter of contract* between it and the borrower," a due-on-sales clause, which "*shall be exclusively governed* by the *terms of the loan contract*, and all rights and remedies of the association and the borrower shall be *fixed and governed by that contract*." *Id.* at 147, 3019 (emphasis added) (quoting 12 C.F.R. § 545.8-3(f) (1982)). Furthermore, paragraph 15 of the loan contract, which was a part of the Agency's uniform mortgage instrument, provided that "[t]his Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located." *Id.* at 148 n.5, 3020 n.5. This Court concluded that the Agency eliminated any potential ambiguity concerning its preemptive intent through language accompanying the regulation. *Id.* at 158, 3025 ("Any ambiguity in § 545.8-3(f)'s language is dispelled by the preamble accompanying and explaining the regulation."). Similarly, the Fifth Circuit concluded that the Agency made its intent clear through the history, content, and purpose of the regulations themselves, statements accompanying the publication of the final rules, the Agency's Office of General Counsel interpretative letter, and its amicus brief to the Fifth Circuit. *See e.g.*, 12 C.F.R. § 545.6-4(a)(2) (1982); 46 Fed. Reg. 24148, 24151 (April 30, 1981) (Res. App. 17); 12 C.F.R. § 545.2 (1992); Office of General Counsel Letter (Pet. A-77).

The Fifth Circuit admitted, of course, that the Office of General Counsel did not consider the definition of "security property" in 12 C.F.R. § 545.32(c). *Id.* at 1048 (Pet. A-32). The Agency did not address that section, however, because no one, prior to this litigation, had ever suggested that it was meant to place a restriction on the ability of federal associations to offer alternative mortgage instruments. In fact, the Petitioner has never offered

any authority for the contention that the definition of "security property" limits an associations' power to engage in alternative mortgage transactions. *Id.* at 1046 (Pet. A-28). Furthermore, the Agency considered the definition of "security property" in its amicus brief to the Fifth Circuit and stated explicitly that section 545.32(c)(2) did not alter its analysis. OTS Brief at 14 (Res. App. 14). The Fifth Circuit, moreover, found the Agency's interpretation of its regulations to be reasonable, and concluded independently that the Agency's definition of "security property" did not preclude preemption. *First Gibraltar*, 19 F.3d at 1049 ("we conclude that the interpretation of the agency as expressed in the FHLBB Letter is a reasonable one") (Pet. A-36).

The Petitioner, however, insists on *ad hominem* attacks that have no basis in the record. The record, for example, contains no evidence to support the Attorney General's assertion that the Agency's Office of General Counsel acted "extra-legally to effectuate their personal agendas." (Pet. at 13). Nor does the record contain evidence to support the Petitioner's insistent characterization of the Office of General Counsel letter as the private opinion of an agency "functionary" or "bureaucrat." (Pet. at 10, 13-14).

In fact, this Court has recognized that an Office of General Counsel advisory letter is the Agency's interpretation. *See Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339 (1973) (treating general counsel's advisory letter interpreting a statute as the agency's interpretation). In this case, moreover, the Federal Home Loan Bank Board issued the letter to a cabinet-level agency of the federal government (the Department of Housing and

Urban Development), the letter was published by Commerce Clearing House, and the Agency knew that HUD intended to utilize the letter to convince Texas lenders that a federal presumption had occurred. Fed. Banking L. Rep. (CCH) ¶ 82,502. The OTS, moreover, has confirmed its continuing agreement with the General Counsel Letter. Brief of Amicus Curiae, The Office of Thrift Supervision (Res. App. 1). In such circumstances, the letter can hardly be considered a private opinion.

Similarly, the Petitioner's contention that a preemption by stealth has occurred is untenable. The Agency conducted a three-volume Alternative Mortgage Transactions Research Study, participated in Senate hearings, and submitted its alternative mortgage transactions regulation for public comment. ALTERNATIVE MORTGAGE INSTRUMENTS RESEARCH STUDY (FHLBB 1977); 43 Fed. Reg. 59,336, 59,336 (Dec. 14, 1978). As the Fifth Circuit observed, "[a]ny objection to the agency's decision could and should have been made during the notice-and-comment periods preceding" the adoption of the Agency's 1978 or 1981 regulations. *First Gibraltar*, 19 F.3d at 1048 (Pet. A-33). The court also noted that "the regulations have been amended several times since 1981, and parties opposed to the preemption of Texas homestead law could have made their voices heard at each stage of the regulations' evolution." *Id.* In fact, "[t]he agencies responsible for regulating federal savings associations, however, have never manifested an intent to retreat from the clear preemption of Texas homestead law accomplished in the late 1970s and early 1980s." *Id.*

Furthermore, Congress expressly recognized in the Parity Act that the FHLBB had "adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing." 12 U.S.C.

§ 3801(a)(3). At the time that Congress passed the Parity Act, FHLBB regulations included express authorization for federal associations to engage in reverse mortgages. 12 C.F.R. § 545.6-4(a)(2) (1982). Significantly, the state could have opted out of the Alternative Mortgage Transactions Parity Act within two years of its enactment. 12 U.S.C. § 3804. It chose not to do so.

The Petitioner also appears to assert that the FHLBB could not authorize alternative mortgage instruments nationwide despite conflicting state law unless the regulation referred to specific state laws, such as the Texas homestead exemption law.[8] The Petitioner, however, offers no authority for that contention. Even assuming, moreover, that the failure to refer specifically to Texas homestead exemption law created some ambiguity, the Agency's reasonable interpretation of its regulations eliminates that ambiguity.

The Petitioner also states that the "preemption is discernible only in a Deputy General Counsel's interpretative letter, issued without opportunity for notice or comment." (Pet. i). As the Fifth Circuit recognized, however, the Agency expressly preempted state law in the Agency's alternative mortgage transactions regulation. *First Gibraltar*, 19 F.3d at 1044 (Pet. A-24-25). Before its promulgation, moreover, the Agency submitted the regulation for notice and comment and participated in Congressional hearings. Further, the Department of Housing

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[8] The Petitioner asks the Court to consider "[w]hether Texas' constitutional and statutory provisions protecting homesteads from foreclosure and forced sale are federally preempted when neither federal statutes nor regulations address state homestead provisions. . . . " (Pet. at i).

and Urban Development concluded, before the Office of General Counsel issued its interpretative letter, that Agency regulations had preempted the conflicting provisions of the Texas homestead exemption law. Finally, the Fifth Circuit concluded, independently of the interpretative letter, that the Agency preempted the conflicting provisions of the Texas homestead law.[9] *Id.* at 1045 (Pet. A-26).

The Petitioner also contends that the Fifth Circuit erred in its interpretation of Agency intent because Congress appears in recent legislation to have recognized the Texas homestead laws. As the Fifth Circuit acknowledged, however, a few incidental references to homestead laws do not evince a congressional intent to prohibit the Agency from promulgating a uniform national rule concerning alternative mortgage instruments. *Id.* at 1045 (Pet. A-35-36). The Petitioner also suggests that some practical difficulties may result from the Agency's preemption.

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[9] The Petitioner prominently cites *United States v. Yazell*, 382 U.S. 346, 86 S.Ct. 500 (1966). The question in *Yazell*, however, was "whether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right which is *not provided by statute or specific agency regulation*, which was not a part of its bargain, and which requires overriding a state law dealing with the intensely local interests of family property and the protection (whether or not it is up-to-date or even welcome) of married women." *Id.* at 349, 505 (emphasis added). The Court specifically declined "to consider the question of the constitutional power of the Congress to override state law in these circumstances by direct legislation or by appropriate authorization to an administrative agency coupled with suitable implementing action by the agency." *Id.* at 352, 506. In contrast this case involves specific agency action under Congressionally delegated authority.

None of those arguments are convincing. The Petitioner, for example, suggests that "[t]here is no federal general common homestead exemption law." (Pet. at 21). The preemption in this case, however, does not require a federal general common homestead exemption law. In fact, home improvements loans are available under the state's homestead laws, and presumably other kinds of home equity loans would receive similar treatment. Other states, moreover, such as Florida, which have similar but waivable homestead laws, have not experienced unusual problems. Indeed, a finding of preemption in this case would merely permit homeowners in Texas to obtain the same sort of loans currently available in forty-nine other states.

As this Court recognized in *de la Cuesta*, cases of administrative preemption require the consideration of two questions: "(1) did the agency intend to preempt state law, and (2) if so, was the agency acting within the scope of its congressionally delegated authority." *First Gibraltar*, 19 F.3d at 1040 (Pet. App. A-13) (citing *de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 302). In this case, the Petitioner has conceded for purposes of the petition that the Agency had the authority to preempt the conflicting provisions of Texas law. (Pet. at 22 n.11). The Agency, moreover, has repeatedly expressed its intent to preempt those provisions in the regulations themselves, its statements in the federal register, its Office of General Counsel interpretative letter, and in the OTS' amicus brief to the Fifth Circuit. The Fifth Circuit in this case merely acknowledged overwhelming evidence of Agency intent.

## CONCLUSION

The question that the Petitioner asks this Court to resolve concerning the deference due a federal agency's interpretation of its own regulations has been resolved since at least 1945. *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217). The issue arises, moreover, only in an alternative holding, and the Fifth Circuit had ample, independent support for its conclusion that Agency regulations pre-empt the conflicting provisions of the Texas homestead exemption law. Because the Petitioner has not asserted any credible grounds for granting the writ, Respondents respectfully request that the Court deny the petition.

Respectfully submitted,

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## TABLE OF CONTENTS – RESPONDENT'S APPENDIX OF AUTHORITIES

Page

Brief of Amicus Curiae, The Office of Thrift Supervision .....App. 1

43 Fed. Reg. 59336, 59336 (Dec. 20, 1978) (Summary to Final Rule) .....App. 17

46 Fed. Reg. 51893, 51893 (Oct. 21, 1981) (Summary to Final Rule) .....App. 17

46 Fed. Reg. 24148, 24151 (April 30, 1981) (Federal Preemption of State Laws).....App. 18

46 Fed. Reg. 51893, 51895 (Oct. 23, 1981) (Reverse-Annuity Mortgages) .....App. 19

46 Fed. Reg. 51893, 51896 (Oct. 23, 1981) (Federal Preemption) .....App. 19

48 Fed. Reg. 23032, 23032 (May 23, 1983) (Summary to Final Rule) .....App. 20

48 Fed. Reg. 23032, 23032 (May 23, 1983) (Scope of Authority).....App. 20

48 Fed. Reg. 23032, 23032-33 (May 23, 1983) (Federal Preemption).....App. 21

48 Fed. Reg. 23032, 23037-38 (May 23, 1983) (Home Loans).....App. 22

48 Fed. Reg. 23031, 23039-40 (Loan-to Value Ratios) .....App. 23

HUD, Request for FHLBB Opinion, by John A. Maxim, Jr., dated Nov. 16, 1988.....App. 24

**Brief of Office of Thrift Supervision**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-8170

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FIRST GIBRALTAR BANK, FSB,
and BENEFICIAL TEXAS INC.,
Plaintiffs-Appellants,

vs.

DAN MORALES, as ATTORNEY GENERAL
for the STATE OF TEXAS,
and ALBERT ENDSLEY, as TEXAS CONSUMER
CREDIT COMMISSIONER,
Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas,
Austin Division

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BRIEF OF AMICUS CURIAE,
THE OFFICE OF THRIFT SUPERVISION

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COMES NOW the Office of Thrift Supervision, an agency within the United States Department of the Treasury, and files this brief of Amicus Curiae pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

## I. INTEREST OF THE AMICUS CURIAE

The Office of Thrift Supervision ("OTS") has principal responsibility for regulating federally chartered savings associations, including appellant First Gibraltar Bank, FSB. *See* 12 U.S.C. §§ 1462a(e), 1463(a). This case involves construction of regulations issued by OTS regarding alternative mortgage instruments secured by a lien on a borrower's homestead, and whether these regulations have preemptive effect.

The district court held that the Texas homestead exemption laws that limit foreclosures on homesteads to purchase money mortgages and mortgages for home improvements were not preempted by OTS regulations for federally chartered savings associations. The district court relied on an OTS regulation, 12 C.F.R. § 545.32(c), that the court construed as incorporating state law on the enforceability of mortgage loans.

The plaintiffs appealed, arguing in part that the district court erroneously failed to defer to an opinion of the Deputy General Counsel of the Federal Home Loan Bank Board that concluded that the Board had preempted the Texas homestead exemption laws. OTS is aware that, because the opinion does not discuss the regulation relied upon by the district court, the opinion is of limited utility in determining the meaning of the regulations. OTS accordingly submits this brief as *amicus curiae* in order to explain that the intent of its predecessor agency was to preempt the Texas homestead exemption laws.[1]

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[1] The district court correctly concluded that "the Director [of OTS] has the authority to promulgate regulations that preempt state law." Slip op. at 11.

OTS also wishes to alert the court that this agency currently is considering whether, in light of the district court's order, it may be appropriate to amend the existing OTS regulations to clarify the agency's preemptive intent.

## II. SUMMARY OF ARGUMENT

Since 1978, OTS and its predecessor agency, the Federal Home Loan Bank Board have intended to preempt any state laws that impede federally chartered savings association from engaging in alternative mortgage transactions. The original authority to engage in such transactions had preemptive effect, and the Bank Board made the preemption explicit in 1981. Subsequent revisions to Bank Board regulations have preserved this preemptive intent. The regulation relied upon by the district court to find that preemption had not occurred was revised only to deal with security interests in time-share units, and there is no indication that the regulation was intended to diminish the Bank Board's preemption of state law.

## III. ARGUMENT

**OTS has preempted the Texas homestead laws to the extent that those laws impair the ability of federally chartered savings associations to engage in alternative mortgage transactions.**

In the absence of federal statutes or regulations, Texas law would preclude alternative mortgage transactions.[2] Under Article XVI, Section 50 of the Constitution

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[2] The term "alternative mortgage transactions" is defined in 12 U.S.C. § 3802(1). We understand that the types of alternative mort-

of the State of Texas and a similar state statutory provision, a lien on a homestead[3] is not valid unless the encumbrance was "properly fixed on [the] homestead property for: (1) [a] purchase money [mortgage]; (2) taxes

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gage transactions at issue in this appeal are reverse-annuity mortgages and line of credit conversion mortgages. The district order described these instruments as follows: "A reverse mortgage is basically the opposite of a mortgage. Instead of paying a mortgage company regularly scheduled payments in a specified amount, the mortgage company pays the borrower regularly scheduled payments in specified amounts. A line of credit conversion mortgage is a variant of a reverse mortgage. Instead of receiving regularly scheduled payments, the borrower has the option of receiving payments on demand in a desired amount." Slip op. at 2 n.3. This brief also uses the term "home equity conversion lending," which should be understood to encompass both reverse annuity mortgages and line of credit conversion mortgages.

[3] The Texas Property Code § 41.002 defines "homestead" as follows:

> (a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of no more than one acre of land which may be in one or more lots, together with any improvements thereon.
>
> (b) If used for the purposes of a rural home, the homestead shall consist of:
>
> (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
>
> (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

Tex. Prop. Code Ann. § 41.002 (Vernon Supp. 1993).

on the property, or work and materials used in constructing improvements on the property. . . . " Tex. Prop. Code Ann. § 41.001 (Vernon Supp. 1993). *See also* Tex. Const. Art. XVI, § 50 (1876, amended 1973).[4]

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[4] The constitution of the State of Texas states, in pertinent part:

> The homestead of a family, or single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married.

Tex. Const. Art. XVI, Sec. 50 (1876, amended 1973). The entire relevant statutory provision reads:

> § 41.001. Interests in Land Exempt from Seizure
> (a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

Since 1978, the OTS and its predecessor agency, the Federal Home Loan Bank Board (the "Board"), have intended to preempt all state laws that directly or indirectly restrict the ability of savings associations to engage in alternative mortgage transactions. The original authorization by the Board to engage in alternative mortgage transactions had preemptive effect, and the Board subsequently made that preemption explicit. Later revisions to the preemption regulation were not intended to diminish the preemptive effect of the Board's rules.

A. The 1978 Alternative Mortgage Instruments Regulation

In 1978, the Board authorized federal savings associations to engage in a variety of alternative mortgage transactions, including "reverse-annuity mortgages," which it defined as an "instrument [that] provides periodic payments to homeowners based on accumulated equity." 12

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(b) Encumbrances may be properly fixed on homestead property for:

(1) purchase money;

(2) taxes on the property; or

(3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married.

(c) The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.

Tex. Prop. Code Ann. § 41.001 (Vernon Supp. 1993).

C.F.R. § 545.6-2(d)(1) (1979).[5] The Board explained that "reverse-annuity mortgage[s] are hereby authorized *nationwide*. The Bank Board believes these instruments are necessary, in addition to standard fixed-rate, fixed-payment mortgages, in order to meet the needs of homeowners during different phases of their financial life cycles." 43 Fed. Reg. 59336 (December 14, 1978) (emphasis added). The Supreme Court has recognized that the nationwide authorization of a particular lending practice preempts any impeding state law. *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 159 (1982).

B. Explicit Preemption Regulations, 1981-1982

Although the Board's "nationwide authorization" of reverse-annuity mortgage as sufficient to preempt any restrictions in state law, the Board added an explicit preemption provision to the alternative mortgage instruments regulation in 1981. The provision stated that:

> [t]his [alternative mortgage instruments] regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in 5(a) of the Home Owners' Loan Act of 1933, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase,

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[5] Other alternative mortgage transactions authorized included graduated payment mortgages and variable rate mortgages. *See* 12 C.F.R. § 545.6-2(b), (c) (1979).

> or participate in the alternative mortgage instruments set forth in this section [545.6-4], or to directly or indirectly restrict such ability or right.

12 C.F.R. § 545.6-4(a)(2) (1982). The Board believed – and OTS believes now – that this provision preempted the Texas homestead laws to the extent those laws impeded reverse-annuity mortgage lending by federal savings associations.

This preemption provision was modeled on and was virtually identical to a preemption provision promulgated at the same time in the regulation governing adjustable mortgage loans ("AMLs").[6] The preamble to the AML regulation stated that, with respect to AMLs, "[t]he Board's exercise of this authority is preemptive of any state law purporting to restrict the ability or right of any federal association or federal savings bank to use [AML] instruments." 46 Fed. Reg. 24151 (April 30, 1981). The Board explained that "[t]his preemption has the effect of

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[6] "An adjustable mortgage loan is a loan that permits adjustment of the interest rate." 12 C.F.R. § 545.6-4a(b)(1) (1982). As to preemption, the AML regulation stated:

> This regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in 5(a) of the Home Owners' Loan Act of 1933, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase, participate, or otherwise deal in adjustable mortgage loans, or to directly or indirectly restrict such ability or right.

12 C.F.R. § 545.6-4a(a)(2) (1982).

precluding the application of the laws of approximately 30 states prohibiting the charging of interest on interest." *Id.*

When it published the final regulation, the Board stated that it intended to achieve for alternative mortgage instruments the same preemptive effect that it provided for AMLs: "[t]he Board also takes this opportunity to amend 12 C.F.R. § 545.6-4, pertaining to other alternative mortgage instruments, by inserting a similar preemption of inconsistent state law." *Id.*

The preemptive effect of the alternative mortgage instruments regulation was re-affirmed several months later, when the Board amended the reverse mortgage regulation for other reasons. The Board was explicit that the preemption in "the alternative mortgage instruments regulation . . . covers the [reverse-annuity mortgage] amendments as well." 46 Fed. Reg. 51896 (October 23, 1981).

C. 1982 Revisions to Real Estate Lending Regulations

In 1982, the Board, acting in response "to a number of requests to authorize the issuance of new and viable types of mortgage instruments," 47 Fed. Reg. 36612 (August 23, 1982), consolidated various regulations granting specific authority to federal associations to engage in real estate lending. The Board "replace[d] . . . the regulations authorizing the use of specific types of mortgage instruments with a general authorization to make home loans on which the interest rate, the payment, the loan balance and the term of maturity could be adjusted." *Id.*

Among the instruments included in the revised regulation were reverse-annuity mortgages. *Id.*

The revised regulation, encompassing "other residential real estate loans," was codified at 12 C.F.R. § 545.6-2, and it was covered by virtually the same broad preemption language that was added to the alternative mortgage transaction regulations in 1981. Specifically, the new regulation stated in part that:

> This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, sell, purchase, participate or otherwise deal in the mortgage loan instruments set forth in this part, or directly or indirectly to restrict such ability or right.

12 C.F.R. § 545.6(a)(2) (1983).

D. 1983 Revision of the Preemption Regulation

Following the passage of the Garn-St. Germain Depository Institutions Act of 1982, the Board issued new regulations to implement the enhanced authority granted to the agency under that legislation. The regulations on other residential real estate loans was re-codified at 12 C.F.R. § 545.33(c) (1984).

The Board's sole purpose was to revise Part 545 "to permit Federal associations to engage in all activities authorized by statute subject to these regulations and to incorporate various technical amendments. These amendments expand the investment authority of, and services offered by, Federal associations." 48 Fed. Reg. 23032 (May 23, 1983).

The 1983 regulations were not intended to diminish existing lending authority. The revised regulations were part of a "new approach" to the promulgation of regulations "[i]n order to grant associations the maximum flexibility to exercise the authorities of the HOLA." *Id.* The changes to Part 545 constituted a "simplification, reduction and renumbering of existing authority." *Id.* Under the new approach, "[t]he Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised." *Id.* Specifically with respect to reverse annuity mortgages – home equity conversion loans – the preamble states that "the substance of these provisions is unchanged from the Board's prior regulations." 48 Fed. Reg. 23037-23038 (May 23, 1983).[7]

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[7] In this summary, the Board is referring to Section 545.33(c) governing amortization which originally read: "the loan may be fully amortized, partially amortized, nonamortized, or a line-of-credit loan. The loan contract may provide for the deferral of principal and capitalization of a portion of the interest, or of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made." 12 C.F.R. 545.33(c) (1983). Most of this provision was later moved to Section 545.32(b) by a "technical correction" to the regulations made in October of 1984. 49 Fed. Reg. 43040 (October 26, 1984). The summary accompanying those changes simply noted that "[t]he substance of the regulations is unchanged but the relocation of the amortization language clarifies that any real estate loan may be fully or partially amortized, nonamortized or a line-of-credit loan, subject to the relevant regulations applicable to the particular type of loan." 49 Fed. Reg. 43041 (October 26, 1984). Amortization language was retained in the revised Section 545.33: "[t]he loan contract may provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower occupied property

As part of its effort to simplify the regulations and maximize the ability of federal associations to exercise their powers under HOLA, the Board promulgated a single preemption regulation that covered all operations of federal associations. The new preemption provision stated:

> The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association.

12 C.F.R. § 545.2 (1984). This regulation is substantially similar to the earlier preemption provision in § 545.6(a)(2). The only change was to substitute "the operations of a Federal association" for the phrase "a Federal association's ability or right to make, sell, purchase, participate or otherwise deal in the mortgage loan instruments set forth in this part, or directly or indirectly to restrict such ability or right." Although the Board did not discuss the reason for this change, it is evidence that, in view of the Board's expressed desire for simplification, the change in language was necessary to cover all operations of a Federal association and to enable the preemption provision to encompass operations beyond mortgage loan instruments. There is no basis for supposing that the

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and on which periodic advances are being made." 12 C.F.R. 545.33(a).

Board intended to reduce the preemptive effect of its regulations.

E. 1983 Revision of the Real Estate Lending Regulation

Specific revisions to the real estate lending regulation in 1983 also reflected the Board's preemptive intent. As revised in 1983 (and in its still current form), section 545.32 provides broad authority to federal savings associations to engage in alternative mortgage lending. Under *De La Cuesta,* this authorization has preemptive effect. Section 545.32(b)(4) specifically authorizes associations to make reverse mortgages by explicitly permitting the use of those amortization techniques associated with reverse mortgages and authorizing the use of line of credit loans. The regulation states in pertinent part: "a real estate loan may be fully amortized, partially amortized, nonamortized, or a line of credit loan, and the loan contract may provide for the deferral of principal and capitalization of a portion of the interest." 12 C.F.R. 545.32(b)(4).

The district court below, however, did not address section 545.32(b)(4) and instead focused on another part of the 1983 real estate lending regulation relating to "security property." To a limited extent, the definition of "security property" is a successor to a provision defining loans secured by real estate which appeared in previous regulations. The language of the "security property" definition relied upon by the district court, however, was not introduced until 1983. In response to concerns abut the classification of loans made by associations secured by an interest in a time-share unit, the Board in 1983 revised the

real estate lending regulation for the purpose of ensuring that "an association may make a real estate loan on the security of a time-share unit if the security property is real estate under state law." 48 Fed. Reg. 23036 (May 23, 1983). The provision stated in part that: "A loan is made on the security of real estate if . . . [t]he security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located." 12 C.F.R. 545.32(c)(2). The district court below concluded that the language of section 545.32(c) regarding "enforceability" as a real estate mortgage "pursuant to the law of the state in which the property is located," which had not appeared in previous regulations, meant that the Bank Board and OTS had not preempted the Texas prohibition on home equity lending. Slip op. at 14.[8]

We respectfully believe that the district court misconstrued the Board's intent. It is anomalous, in view of sections 545.2 and section 545.32(b)(4), to construe a revision of a regulation directed at interests in time-share units as diminishing the Board's preemptive intent. The Board's, and now OTS', preemption of state law has

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[8] In addition, the district court ruled that an opinion issued by the Federal Home Loan Bank Board ("the Board") supporting preemption was unreasonable. Slip op. at 16. The opinion issued by the General Counsel of the Board on August 4, 1989 concluded that the regulations governing alternative mortgage lending by federal associations pre-empt the restrictions of the Texas homestead laws. We believe this opinion is additional evidence of the agency's intent to preempt state laws that interfere with this authority. We note, however, that the opinion does not discuss the regulation that concerned the district court, 12 C.F.R. § 545.32(c)(2).

remained intact since 1978. It preempts the Texas homestead laws to the extent these laws impede alternative mortgage transactions by federal savings associations.

OTS is, of course, cognizant that section 545.32(c)(2) appears to raise a question as to the preemptive effect of sections 545.2 and 545.32(b)(4). The agency now is considering how appropriately to remove any uncertainty that may exist as to the agency's preemptive intent.

## IV. CONCLUSION

OTS respectfully requests that this Court reverse the decision and order of the District Court.

Dated: July 21, 1993

CAROLYN B. LIEBERMAN
Acting Chief Counsel

/s/ Dwight C. Smith
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**43 Fed. Reg. 59336, 59336 (Dec. 20, 1978)**
**(Summary to Final Rule)**

**SUMMARY:** These regulations authorize a number of new types of mortgage instruments for use by Federal savings and loan associations: the variable rate mortgage, graduated payment mortgage, and reverse-annuity mortgage. The variable rate mortgage will, where found to be needed, be authorized on a state-by-state basis; the graduated payment mortgage and reverse-annuity mortgage are hereby authorized nationwide. The Bank Board believes these instruments are necessary, in addition to the standard fixed-rate, fixed-payment mortgage, in order to meet the needs of homeowners during different phases of their financial life cycles.

**EFFECTIVE DATE: January 1, 1979**

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**46 Fed. Reg. 51893, 51893 (Oct. 21, 1981)**
**(Summary to Final Rule)**

**SUMMARY:** The Federal Home Loan Bank Board hereby amends its regulation authorizing federally-chartered thrift institutions to make non-amortized and partially-amortized loans by raising the maximum loan-to-value ratio from 60 to 95 percent, removing the existing five-year maximum on the terms of such loans, and permitting the interest rates on such loans to be adjusted periodically. The Board also liberalizes its regulation authorizing the issuance of reverse-annuity mortgage loans by deleting the requirements that such loan plans be submitted to the Board, that lenders offer refinancing of such loans at maturity, and that such loans bear a fixed

interest rate. These actions are intended to enhance associations' ability to balance the yields of their investment portfolios with their liabilities, and to meet borrowers' needs for additional home-financing options.

**EFFECTIVE DATE:** October 21, 1981.

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**46 Fed. Reg. 24148, 24151 (April 30, 1981)**
**(Federal Preemption of State Laws)**

**Federal Preemption of State Laws**

In the AML regulation, the Board codifies its view that the regulation is promulgated pursuant to the Board's plenary and exclusive authority to regulate all aspects of the operations of Federally-chartered savings and loan associations and mutual savings banks. As such, the Board's exercise of this authority is preemptive of any state law purporting to restrict the ability or right of any Federal association or Federal savings bank to use adjustable mortgage loan instruments. This preemption has the effect of precluding the application of the laws of approximately 30 states prohibiting the charging of interest on interest. The Board also takes this opportunity to amend 12 CFR 545.6-4 pertaining to other alternative mortgage instruments, by inserting a similar preemption of inconsistent state law.

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**46 Fed. Reg. 51893, 51895 (Oct. 23, 1981)**
**(Reverse-Annuity Mortgages)**

**Reverse-Annuity Mortgages**

The Board has determined to amend its reverse-annuity mortgage (RAM) regulation (12 CFR 545.6-4(c)) substantially as proposed. Thus, the provision requiring submission of each RAM program to the Board for a 60-day review period is deleted. The Board is of the view that the regulation is specific enough as to the structure and required disclosure of RAMs that such review is unnecessary. In addition, the requirement that the interest rate be fixed is removed. The Board believes these changes will greatly improve the marketability of RAM loans, which have not been widely used by federal associations.

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**46 Fed. Reg. 51893, 51896 (Oct. 23, 1981)**
**(Federal Preemption)**

**Federal Preemption**

The final regulation contains language expressly preempting any state law that purports to prevent a federal association from making, purchasing, selling or otherwise dealing in residential real estate loans authorized under 12 CFR 545.6-2. The Board notes that the alternative mortgage instruments regulation authorizing the making of RAMs already contains such preemptive language (12 CFR 545.6-4(a)(2)). This language covers the RAM amendments as well.

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**48 Fed. Reg. 23032, 23032 (May 23, 1983)**
**(Summary to Final Rule)**

**SUMMARY:** The Federal Home Loan Bank Board has implemented the new powers granted to Federal associations by the Garn-St Germain Depository Institutions Act of 1982 by issuing new regulations on public unit NOW accounts, demand deposits, commercial lending, and operating leases, and by amending its regulations on real estate lending, consumer loans, commercial paper and corporate debt security investments, investments in government securities, service corporation activities and limits on loans to one borrower. The Board has also made revisions to its regulations to permit certain suretyship and trust activities and collateralization of deposits. Further, the Board has revised Part 545 to permit Federal associations to engage in all activities authorized by statute subject to these regulations and to incorporate various technical amendments. These amendments expand the investment authority of, and services offered by Federal associations.

**EFFECTIVE DATE: May 26, 1983.**

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**48 Fed. Reg. 23032, 23032 (May 23, 1983)**
**(Scope of Authority)**

*Scope of Authority*

Current Part 545 is based upon the premise that the investment authority of the HOLA must be implemented expressly by regulation. Many of the provisions of the statute, however, do not require regulatory action. In order to grant associations the maximum flexibility to exercise the authorities granted by the HOLA, the Board

has determined to revise the general approach to regulating investment activities of Federal associations. Accordingly, Part 545 now addresses the authority of associations only to limit, interpret or recognize incidental authority. Federal associations may exercise all of the authority granted by the HOLA subject only to limitations contained in the regulations. Because this approach differs from the current treatment, these amendments to Part 545 include a section specifically stating that Federal associations may exercise all statutory authority subject to the limitations in this Part. The Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised. In addition, to facilitate the transition to the new rules, § 545.3 provides that until December 31, 1983, associations may continue to rely on the regulations as they existed prior to adoption of these amendments.

**48 Fed. Reg. 23032, 23032-33 (May 23, 1983)**
**(Federal Preemption)**

*Federal Preemption*

The proposal included a new section stating specifically the Board's intent that these regulations preempt state law. The preemptive effect of the Board's regulations has been amply recognized by the courts; it derives from and is an integral part of the Board's exercise of its authority under Federal law. Although a statement is unnecessary to give these regulations preemptive effect, the Board desires to make clear its views on the preemptive nature of the authority conferred on Federal associations by the HOLA and the Board's regulations.

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**48 Fed. Reg. 23032, 23037-38 (May 23, 1983)**
**(Home Loans)**

*Home Loans*

*General.* Section 545.33 of the regulations defines a home loan as one made on the security of homes, including a unit of a condominium or cooperative, combination of homes and business property, farm residences, and combinations of farm residences and commercial farm real estate, and states the applicable limitations. The existing maximum term of 40 years for a home loan has been retained, as has the requirement for semi-annual payments of interest, except as expressly authorized. Home loans must be repaid in semi-annual installments, except for those loans that are nonamortized (*i.e.*, interest-only loans) or that are line-of-credit loans. Nonamortized loans, by their nature, require no repayments of principal until maturity and the Board has expressly excluded them in order to clarify its position with respect to questions that have arisen about repayment of principal on such home loans.

In response to comments on the matter of repayments of principal, the Board is amending the regulations pertaining to the loans on the security of farm residences and combinations of farm residences and commercial farm real estate. Borrowers that obtain such loans often receive their income on an annual basis concurrently with their crop sales. The Board believes that associations providing services to this type of borrower should have the flexibility to structure the loan repayments to meet the ability of these borrowers to pay. Accordingly, § 545.33

expressly authorizes home loans to such borrowers to be repaid in at least annual installments.

Section 545.33 of the final amendments states that a home loan may be fully amortized (principal payments made over the term of the loan), partially amortized (balloon loan), nonamortized (interest-only), or a line-of-credit loan (either open-end or closed-end). In addition, the loan contract may provide for negative amortization of a portion of the interest, or of all interest on a loan such as a reverse annuity mortgage. The substance of these provisions is unchanged from the Board's prior regulations. As provided in § 545.33(b)(3), an association may also receive part of the consideration for making a home loan in the form of a share of the property's appreciation since origination or as allowed by the Board ruling at § 555.19.

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**48 Fed. Reg. 23031, 23039-40 (Loan-to Value Ratios)**

Under the disclosure regulations adopted in August 1982, an association was required to disclose a "description of all contractual contingencies under which the loan may become due or which may result in a forced sale of the home." This language caused some uncertainty about exactly what information must be disclosed. As a result there has been a lack of uniformity in the types of information being received by prospective borrowers. The final amendments clarify this language by excluding from this requirement the standard default provisions that arise "from the borrower's breach or nonperformance of an obligation under the loan contract or mortgage." The Board believes that compliance with this provisions will

not be unduly burdensome because most mortgage instruments contain relatively few such provisions. For example, this paragraph would require disclosure of provisions in a contract for a reverse annuity mortgage under which the outstanding loan principal may become due and payable as a result of the borrower's death, upon maturity of the loan, or upon a failure to maintain the security property.

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**HUD, Request for FHLBB Opinion, by John A. Maxim, Jr., dated Nov. 16, 1988**

November 16, 1988

Mr. Jordan Luke
General Counsel
Federal Home Loan Bank Board
1700 "G" Street, N.W.
Washington, D.C. 20552

Dear Mr. Luke:

SUBJECT: Federal Preemption of Texas Homestead Mortgage Restrictions for Home Equity Conversion Mortgages

As we explained in a request for opinion dated September 26, 1988, this Department is implementing a demonstration program to insure home equity conversion mortgages (i.e., reverse mortgages) under Section 255 of the National Housing Act, as added by Section 417 of Pub. L. 100-242. Our September 26 request concerned the extent to which the preemption regulations of the Federal Home Loan Bank Board (Board) under Title VIII of the Garn-St. Germain Depository Institutions Act of 1982

(Garn-St. Germain Act) apply to line of credit reverse mortgages. We also now desire an opinion on whether Title VIII of the Garn-St. Germain Act and implementing regulations preempt the restrictions on homestead mortgages in Texas. If not preempted, those restrictions would prevent many lenders from making any reverse mortgages in Texas.

The Texas State Constitution (Art. 16, § 50) and the Texas code (V.T.C.A., Property Code § 41.001 and 41.002) protect a "homestead" from any forced sale (e.g., a foreclosure sale) by a creditor, with only three exceptions: when the debt is (1) for the purchase of the homestead, (2) for taxes on the homestead, or (3) for work and material used in constructing improvements on the homestead. A borrower may only waive its homestead exemption by failure to raise the exemption as a defense in legal proceedings. *Sudderth v. Howard*, 560 S.W. 2d 511 (Civ. App. 1977). Since the exemption cannot be waived when the loan is originated, creditors only will make a loan secured by a homestead if covered by one of the three exceptions.[1] Our Regional Counsel's Office in Fort Worth advises that regular home equity lines of credit are

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[1] While many state laws provide for a homestead exemption, generally such exemptions either can be waived at origination or are limited to a specific dollar amount. For example, the mortgage forms commonly used for conventional residential mortgage loans, issued by the Federal National Mortgage Association and the Federal Home Loan Bank Board, contain homestead waiver provisions in eighteen states. We are not aware of any states other than Texas in which the homestead exemption would be both absolute and non-waivable when applied to reverse mortgages.

unavailable in Texas for this reason. The reverse mortgages to be insured under our demonstration program will not be covered by any of the three exceptions to the Texas homestead exemption. Further, a significant proportion of mortgages insured under the Department's programs are made by state-chartered lenders, such as mortgage bankers, which would clearly be subject to the restrictions of Texas law in the absence of Federal preemption.[2]

Title VIII of the Garn-St. Germain Act provides that state-chartered lenders (other than banks and credit unions) may make "alternative mortgage transactions" in accordance with regulations of the Board in order to provide them with "parity" with Federally-chartered institutions. Section 804(c) provides that "[A]n alternative mortgage transaction may be made . . . notwithstanding any State constitution, law or regulation." We interpret Section 804(c) to apply only to those alternative mortgage transactions made in accordance with regulations as required by Section 804(a)(3). The applicable regulations under Title VIII (except for banks and credit unions) are identified in the Appendix at the end of 12 CFR Part 545, and include Sections 545.32(b)(4) and 545.33(c). Section 545.32(b)(4) states that a loan can be " . . . fully amortized, partially amortized, nonamortized, or a line-of-credit loan, and the loan contract may provide for the deferral

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[2] For purposes of this request for an opinion, we have assumed that the restrictions of Texas law discussed in this letter are preempted for Federally-chartered savings and loan associations regulated by the Board. *See* 12 CFR 545.2. Please advise us if this assumption is incorrect.

and capitalization of a portion of the interest." Section 545.33(c) provides that "[T]he loan contract may provide for the deferral and capitalization of all interest on loans . . . which periodic advances are being made."

Title VIII, by its express terms, is clearly applicable in all states. Moreover, Sections 545.32(b)(4) and 545.33(c) are broad enough to clearly preempt many of the usual state law obstacles to reverse mortgages. We have some doubt, however, whether Section 804 and the applicable regulations have the effect of preempting the Texas law of homesteads, since the state law does not appear to be a special restriction on state institutions issuing alternative mortgages, but broadly encompasses even traditional second mortgages issued by any state-chartered lender. Additionally, while Section 545.32(b)(4) and 545.33(c) enumerate some types of loan contracts that are permitted under Title VIII, the regulations do not expressly address the unique homestead mortgage restrictions in Texas. We have had many inquiries, from persons who are aware of the Texas homestead mortgage exemption, about whether our reverse mortgage demonstration will be available in Texas. We have been unable to give any definitive answer in the absence of an authorative interpretation of the Board's preemptive regulations under Title VIII of the Garn-St. Germain Act.

We suggest two lines of argument supporting a preemption of the Texas restrictions. First, we believe that it would be inconsistent with the purposes of Title VIII of the Garn-St. Germain Act to have regulations which permit reverse mortgages in 49 states but exclude Texas, since Title VIII was broadly intended to remove differences among states with regard to lender ability to make

alternative mortgage transactions, including reverse mortgages. Even if the Board's regulations *could* be interpreted to exclude Texas, we believe the opposite interpretation is called for in light of the statutory purposes of Title VIII. As a second line of argument, we believe that it would be inconsistent with Title VIII to preempt only some types of state law obstacles to reverse mortgages and not others. As long as reverse mortgages are authorized by the Board's regulations, Section 804(c) appears to preempt "*any* State constitution, law or regulation" (emphasis added) which would prevent a lender from making such mortgages. The Board does not appear to have the power to choose which state restrictions will be preempted.

Since we had contacted you last, the Department has issued its proposed rule on insurance for reverse mortgages at 53 Fed. Reg. 43156 (Oct. 25, 1988). The rule proposes to allocate the insured mortgages among the ten HUD Regions and current plans are to announce the allocations in early January. The purpose of this allocation is to provide lenders and elderly individuals in all states, including Texas, with an opportunity to participate in this program. While we believe that Title VIII of the Garn-St. Germain Act and the applicable regulations are broad enough to include reverse mortgages in Texas, we would appreciate your opinion.

Mary K. Roma of my staff has informally discussed these issues with Mr. Richard Katz who is in receipt of our September 26th request for opinion. If you have any further questions, please contact Ms. Romas at 755-5272, or Donald Alexander at 755-7070.

Thank you for considering this issue.

Sincerely,

/s/ John A. Maxim, Jr.
John A. Maxim, Jr.
Associate General Counsel
for Insured Housing
and Finance

We were similarly concerned with the mortgagee's ability to enforce a due-on-sale clause on these line of credit home equity conversion mortgages which would probably not involve the "periodic payments" discussed in section 591.2(n). However, we obtained a copy of an opinion by Mr. Jack D. Smith, your Deputy General Counsel, which stated that the periodic payment characteristic was satisfied if the mortgagor had the option of receiving such payments. We therefore request an opinion from your office as to whether a similar interpretation can be applied to the term "and on which periodic advances are being made" in section 545.33(c) and whether these line of credit reverse equity mortgages would meet the requirements for federal preemption. If you have any additional questions, please contact Ms. Kathy Davies at 755-7080, or Donald B. Alexander at 755-7070. Thank you for your consideration of these issues.

Sincerely,

/s/ Illegible for John A. Maxim, Jr.
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and Finance

(4)

No. 94-209

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

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DAN MORALES, AS ATTORNEY GENERAL
FOR THE STATE OF TEXAS, AND
ALBERT ENDSLEY, AS TEXAS
CONSUMER CREDIT COMMISSIONER,

*Petitioners,*

v.

FIRST GIBRALTAR BANK, FSB,
AND BENEFICIAL TEXAS, INC.,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# CONSOLIDATED BRIEF OF STATE AMICUS CURIÆ IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER

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[State Attorneys General Listed Inside Cover]

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9 pp

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## QUESTION PRESENTED BY TEXAS PETITIONERS

**WHETHER TEXAS' CONSTITUTIONAL AND STATUTORY PROVISIONS PROTECTING HOMESTEADS FROM FORECLOSURE AND FORCED SALE ARE FEDERALLY PREEMPTED WHEN NEITHER FEDERAL STATUTES NOR REGULATIONS ADDRESS STATE HOMESTEAD PROVISIONS, AND WHEN ANY PREEMPTION IS DISCERNIBLE ONLY IN A DEPUTY GENERAL COUNSEL'S INTERPRETIVE LETTER, ISSUED WITHOUT OPPORTUNITY FOR NOTICE OR COMMENT.**

## TABLE OF CONTENTS

QUESTION PRESENTED BY TEXAS PETITIONERS

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TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

CASES . . . . . iii

CONSTITUTIONS, STATUTES AND REGULATIONS . . . . . iii

INTEREST OF AMICUS CURIAE . . . . . 2

SUMMARY OF ARGUMENT . . . . . 3

ARGUMENT . . . . . 3

CONCLUSION . . . . . 5

## TABLE OF AUTHORITIES

### CASES

*Aronson v. Quick Point Pencil Co.*, 440 U. S. 257 (1979) . . . 3

*BFP v. Resolution Trust Corp.*, 114 S.Ct. 1757 (1994) . . . . . 3

*Butner v. United States*, 440 U.S. 48 (1979) . . . . . 3

*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) . . . . . 3

*Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) . . . . . 4

*O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994) . . . . . 3

### CONSTITUTIONS, STATUTES AND REGULATIONS

12 C.F.R. § 545.33(f) (1994) . . . . . 4

Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-70 (1988 & Supp. IV 1992) ("HOLA") . . . . . 3

U.S. CONST., art. VI, cl. 2 . . . . . 2

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The states of Idaho, Indiana and Louisiana, each by and through its respective undersigned attorney general (the "States"), together respectfully submit this their consolidated brief as amicus curiæ in support of the petition of Dan Morales, as Attorney General for the State of Texas, and Albert Endsley, as Texas Consumer Credit Commissioner (together, "Texas") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. The States respectfully submit this brief as of right pursuant to Rule 37.5 of the rules of this Court.

## INTEREST OF AMICUS CURIAE[1]

Each of the States has a strong interest in the validity and enforceability of its own laws respecting real property, and particularly of its laws respecting the homes of its residents, any foreclosure thereon, or any forced sale thereof. Thus, each State has a strong interest in supporting the relief requested by Texas' petition for writ of certiorari and in opposing any impermissible attempt by any federal agency, and particularly by the federal Office of Thrift Administration ("OTS") as reflected in this case, extra-legally to encroach upon the States' respective domestic real and family property laws beyond the contemplation of the Supremacy Clause of the Constitution of the United States, *see* U.S. CONST., art. VI, cl. 2 (the "Supremacy Clause"), and beyond Congress' intent in its exercise of its powers under the Supremacy Clause.

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[1] Editorial Note: *See* S. Ct. R. 37.6 [sufficient for amicus briefs to set forth "the interest of the *amicus curiæ*, the argument, the summary of argument, and the conclusion," rather than all portions of briefs required of the parties].

## SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case would upset the proper balance of state and national governmental powers by permitting a federal agency to preempt state family property laws through an informal retroactive gloss upon a vague and general federal agency regulation. The Court should grant review in this case, and upon consideration on the merits should reverse the decision below.

## ARGUMENT[2]

Matters traditionally left to the states are presumed not preempted by federal law or regulation, and property law has been traditionally a matter of state law. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Butner v. United States*, 440 U.S. 48, 55 (1979). "It is beyond question that an essential state interest is at issue. . ." in state foreclosure laws. *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1764 (1994). None of the HOLA's statutory provisions suggest that Congress intended to preempt any state's substantive real estate laws, nor do they provide any guidance as to what substantive standards would replace the states' laws if they were preempted. *See* Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-70 (1988 & Supp. IV 1992) ("HOLA"). There is "no federal general common law." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2052-53 (1994), *quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Moreover, nothing in OTS' applicable regulations addresses the

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[2] The States adopt the summary and appendix in Texas' petition respecting applicable statutory and regulatory provisions and the Texas petition's Statement of the Case. Moreover, they join in Texas' statement of Reasons for Granting the Petition, but do not here burden the Court by repeating any portion of the contents of Texas' petition. *See* S. Ct. R. 37.1.

preemption of state substantive family property laws, much less the specific area of homestead exemptions.

*Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), did hold that an OTS regulation effectively preempted California's due-on-sale clause law. However, there the Court construed a regulation that expressly dealt with such clauses. Here there are only the general statutory and regulatory provisions discussed in the Texas petition. In *de la Cuesta*, the regulations provided that due-on-sale clauses would be governed by the contract of the parties. Here, neither federal laws nor regulations provide the rules necessary to fill the gaps left by the assertedly preempted Texas laws. Thus, whether correctly decided or not, at least *de la Cuesta* left substantive rules for the public, the States and the federal government respecting due-on-sale clauses. By contrast, the Fifth Circuit's decision here leaves chaos and uncertainty, not just as to the rules to be used instead of Texas' homestead exemption, but respecting the validity of a broad range of laws of all states that could be construed as directly or indirectly addressing federal savings association "operations." *See* 12 C.F.R. § 545.33(f) (1994).

The court of appeals found an intent to preempt in a statute and in regulations that the court conceded to be vague on the issue of preemption, based on perceived clarification that the court found in an informal letter that the Fifth Circuit itself characterized as flawed. If this Court countenances the approach toward regulatory preemption adopted by the court of appeals, hardly any state law would be safe from preemption by informal and retroactive "clarification" of broad and vague agency regulations. Nothing could be more pernicious to the federal system or more detrimental to the States' proper exercise of their responsibilities to legislate for the health and safety of their citizens.

Therefore, this case strongly merits review by this Court.

## CONCLUSION

Texas' petition for a writ of certiorari should be granted.

Respectfully submitted:

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